Supreme Court, U.S.
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No. 09-201

In The
Supreme Court of the United States

SIMPLICITY MANUFACTURING, INC.,
Petitioner,

v.

WAYNE BERRIER AND BRENDA GREGG, IN THEIR OWN RIGHT AND AS PARENTS AND NATURAL GUARDIANS OF ASHLEY BERRIER, A MINOR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court overturn the court of appeals' adoption of the Restatement Third, Torts: Products Liability ("Third Restatement") as a violation of the fundamental constitutional principle of federalism embodied in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in light of the facts that (a) two justices of the state supreme court had, in response to the court of appeals' certification request (denied by the state court), urged the court of appeals to apply current Pennsylvania law narrowly until the state supreme court ruled otherwise, and (b) shortly after the court of appeals' decision, the state supreme court expressly declined an invitation to abandon its long-standing adoption of the Restatement (Second) of Torts § 402A and instead adopt the Third Restatement relied on by the court of appeals?

2. When a state supreme court declines to accept certification of a question of state law, should standards be set that govern the court of appeals' assessment of the state court's action and a concurring statement by two justices of the state court?

LIST OF PARTIES TO THE PROCEEDING BELOW

The names of all parties in the court of appeals are: Simplicity Manufacturing, Inc. (Defendant-Petitioner), and Wayne Berrier and Brenda Gregg, in their own right and as parents and natural guardians of Ashley Berrier, a minor (Plaintiffs-Respondents).

CORPORATE DISCLOSURE STATEMENT

As of January 1, 2008, all of the assets of Simplicity Manufacturing, Inc. have been incorporated into Briggs & Stratton Power Products Group, LLC. Briggs & Stratton Power Products Group, LLC is a wholly owned subsidiary of Briggs & Stratton Corporation, which is a publicly traded company.

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OPINION BELOW

The opinion of the court of appeals is reported at 563 F.3d 38. The opinion of the district court granting summary judgment to Defendant-Petitioner is reported at 413 F. Supp. 2d 431. The Pennsylvania Supreme Court's denial of certification is reported at 598 Pa. 594.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2009. The court of appeals denied a petition for rehearing on May 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISION INVOLVED

The rule of the United States Court of Appeals for the Third Circuit for certifying questions of state law is set forth in L.A.R. Misc. 110.1, set forth at Pet. App. 184a.

The Pennsylvania Supreme Court's rule for accepting a certified question is set forth in its Internal Operating Procedures § 10, set forth at Pet. App. 181a.

STATEMENT OF THE CASE

In this product liability action, plaintiffs Wayne Berrier and Brenda Gregg, on behalf of their daughter Ashley Berrier, asserted claims against defendant Simplicity Corporation for injuries Ashley

received from an allegedly defective riding lawn tractor manufactured by Simplicity. At the time of the accident, Ashley's grandfather was operating the lawn tractor in the reverse gear. He did not disengage the lawn tractor's blades before backing up. While backing up, he struck Ashley, injuring her left foot.

Plaintiffs filed a two count Complaint based on Section 402A of the Restatement (Second) of Torts ("Second Restatement") and negligence. The crux of both claims was that the lawn tractor's design was defective because it allowed the operator to maneuver the machine in reverse with the mower blades engaged.

Simplicity removed the case to the United States District Court for the Eastern District of Pennsylvania based on diversity of citizenship, 28 U.S.C. § 1332, and subsequently moved for summary judgment. The district court granted Simplicity's motion, dismissing the Complaint in its entirety. The district court ruled that under Pennsylvania's unique scheme of strict products liability law, recovery is limited to those who are intended users of the product. It noted that the "intended user requirement" arises from Pennsylvania's application of the Second Restatement, which focuses on

whether a product is "safe for its intended use."[1] The district court recognized that both the intended use doctrine and the related intended user requirement were reaffirmed by the Pennsylvania Supreme Court as recently as 2003, in *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (Pa. 2003) (Cappy, C.J.). Based on the reasoning of *Phillips*, and because minor-plaintiff was not an intended user of the allegedly defective lawn tractor, the district court held that she could not recover in a strict liability action against Simplicity. The court also dismissed the negligence claim because under Pennsylvania law Simplicity did not owe a legal duty to the minor-plaintiff.

The Berriers appealed. Prior to rendering its decision, the court of appeals' requested, *sua sponte*, that the Pennsylvania Supreme Court accept the following question for review:

> Whether under Pennsylvania law a plaintiff minor child may pursue a strict liability claim for injuries caused

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[1] For over thirty years, Pennsylvania's courts have endeavored to separate negligence concepts from determinations of when a manufacturer can be held strictly liable for injuries caused by allegedly defective products. *See Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975) (Jones, C.J.). As a result, the Pennsylvania Supreme Court has limited the scope of strict liability actions, placing the focus on whether a product is "safe for its intended use" rather than on the question of whether the product is "unreasonably dangerous." *See Azzarello v. Black Brothers Co.*, 391 A.2d 1020, 1026-27 (Pa. 1978) (Nix, J.); *see also Lewis v. Coffing Hoist Div.*, 528 A.2d 590, 593 (Pa. 1987) (Nix, C.J.) (explaining that Pennsylvania's approach to strict liability is different from that used in any other state).

> by a riding lawnmower, where that child is neither an intended user nor consumer of the mower. *See Pennsylvania Department of General Services v. United States Mineral Products Co.*, 898 A.2d 590 (Pa. 2006); *Philips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003); *Riley v. Warren Manufacturing*, 688 A.2d 221 (Pa. Super. 1997).

The Pennsylvania Supreme Court declined the certification request. *See* Pet. App. 124a. However, in a Concurring Statement joined by Chief Justice Castille, Justice Saylor advised the court of appeals that "the federal courts are not without guidance as to current [Pennsylvania] law, since, as the district court recognized, this Court has sent a clear signal that the intended-use doctrine is to be construed narrowly pending a decision on [other] foundational matters." *Id.* Moreover, the Concurring Statement stated there was "no need" for the court of appeals to address the intended use doctrine in this case and that a narrow application of the intended use doctrine does not preclude fair compensation for litigants because "affected product-liability claims are channeled into [a] negligence theory where they may rise or fall on their merits." See Pet. App. 127a.

Nevertheless, the court of appeals did not follow this guidance and reversed the district court's grant of summary judgment, predicting that Pennsylvania would abandon the intended use doctrine in favor of the Third Restatement, thereby allowing bystanders, such as minor-plaintiff, to

recover in strict liability. In other words, the panel stated "that if the Pennsylvania Supreme Court were confronted with this issue, it would adopt the [Third Restatement] §§ 1 and 2, and thereby afford bystanders a cause of action in strict liability under the circumstances here." Pet. App. 10a.

Two months after the court of appeals' panel handed down its decision, the Pennsylvania Supreme Court went in the opposite direction. Specifically, the Pennsylvania Supreme Court dismissed, as "improvidently granted," a previously accepted appeal in *Bugosh v. I.U. N. Am., Inc.*, J-159-2008, No. 7 WAP 2008. The question presented for the Pennsylvania Supreme Court's review in *Bugosh* was "[w]hether the [Pennsylvania Supreme Court] should apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) of Torts."[2] Justice Saylor and Chief Justice Castille dissented. In their Dissenting Statement, Justices Saylor and Castille claimed that circumstances underlying *Bugosh* presented the appropriate vehicle to adopt the Third Restatement as the law of Pennsylvania. However, a majority of the Pennsylvania Supreme Court apparently disagreed.

In the dissent in *Bugosh*, Justice Saylor explicitly commented on this case;

> Although Berrier's prediction that this Court would adopt Sections 1 and 2 of the Third Restatement still may prove

[2] Before the Pennsylvania Supreme Court dismissed the appeal, the issue had been fully briefed by the parties and amicus curae and the court had heard oral argument.

> correct, if my position were to be adopted, it would disprove the federal court's implicit prediction that [this] Court would apply those sections retroactively.

REASONS FOR GRANTING CERTIORARI

By holding that the Pennsylvania Supreme Court would adopt the Third Restatement and abandon the "intended user" doctrine, the court of appeals unilaterally changed a fundamental premise of Pennsylvania's strict liability law that has stood for over thirty years. The court of appeals' decision came after two justices of the Pennsylvania Supreme Court had advised the court of appeals *in this case* to exercise judicial restraint because the Pennsylvania Supreme Court had already sent a "clear signal" that the intended use doctrine should be construed narrowly until the state supreme court ruled differently.

There is no indication in the court of appeals' precedential opinion that it even considered this clear guidance. Indeed, nearly two months later, the Pennsylvania Supreme Court proved the court of appeals wrong. Specifically, the Pennsylvania Supreme Court dismissed an appeal in *Bugosh v. I.U. N. Am., Inc.*, J-159-2008, No. 7 WAP 2008, thereby declining an express invitation to replace the Second Restatement with the Third Restatement. The same two justices who concurred in declining certification specifically commented on the court of appeals' decision in *this* case:

> Although Berrier's prediction that this Court would adopt Sections 1 and 2 of the Third Restatement still may prove correct, if my position were to be adopted, it would disprove the federal court's implicit prediction that the Court would apply those sections retroactively.

Thus, not only did the court of appeals erroneously guess that the Pennsylvania Supreme Court would adopt the Third Restatement in *Bugosh*, but at least two justices of the state court indicated that the court of appeals had preempted the state's authority to decide whether to adopt the predicted change in law retroactively.

The court of appeals' decision creates potential problems. If this Court does not intervene, Simplicity will be required to defend itself, and have its product evaluated by a jury, under the Third Restatement, which is not now, and has never been, the law in Pennsylvania. This predicament is precisely what this Court sought to avoid when it decided *Erie R.R. Co. v. Tompkins* over seventy years ago. Indeed, if the court of appeals' opinion stands, litigants will seek to circumvent application of the long-standing intended use doctrine -- still the law in Pennsylvania -- by filing their claims in federal court. This will not only further congest the federal court dockets in cases concerning predominantly state law issues, but will also produce inconsistent results in Pennsylvania state and federal courts. Specifically, if a litigant pursued a strict liability claim in a Pennsylvania state court based on the

very same facts at issue here, that litigant's strict liability claim would be barred as a matter of law under the intended use doctrine. However, in the federal district courts in Pennsylvania, that same exact claim would be submitted to the jury.

This dichotomy is contrary to the most basic principles of federalism. It should not be permitted to exist. The ability to determine Pennsylvania law must be placed back into the hands of the Pennsylvania courts and legislature.

I. THE COURT OF APPEALS' DECISION TO APPLY THE THIRD RESTATEMENT TO A PENNSYLVANIA STRICT LIABILITY CLAIM VIOLATES PENNSYLVANIA LAW AND NOTIONS OF FEDERALISM.

A federal court sitting in diversity is constitutionally required to apply state substantive law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The *Erie* holding is one of the most fundamental tenets of federalism. Its importance is grounded in the notion that federal courts must not impinge on a state's sovereignty in order to ensure that all litigants in that state are afforded equal protection under the state's law. Accordingly, when a federal court is deciding state claims, the federal court is required to apply the law as interpreted by that state's highest court. *Id.; see also Phoung v. Wyndham Mgmt Corp.*, 496 F.3d 85, 88 (1st Cir. 2007) ("[Federal courts] must apply the state's law on substantive issues. . . .").

This holds true even if the federal court believes that the state's established precedent is improvident or should be changed. In those instances, federal courts still are required to apply state law; they are not to expand state law beyond the limits established by the state's highest court. As emphasized in *Leo v. Kerr-McGee Chemical Corp.*:

> In a diversity case . . . federal courts may not engage in judicial activism. Federalism concerns require that we permit state courts to decide whether and to what extent they will expand state common law . . . . Our role is to apply the current law of the jurisdiction, and leave it undisturbed.

37 F.3d 96, 101 (3d Cir. 1994)(Greenberg, J.); *see also City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 123 (3d Cir. 1993) (Cowen, J.) ("A federal court may act as a judicial pioneer when interpreting the United States Constitution and federal law," but it may not do so in cases founded upon diversity); *Phoung Luc*, 496 F.3d at 88 (stating that federal courts' duty is to apply state law as it currently exists rather than "creat[ing] new rules or significantly expand[ing] existing rules"); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 397 (5th Cir. 1986) (Randall, J.) (stating that a "denial of certification does not give" the federal court "a license to change" state law); *Devnew v. Brown & Brown, Inc.*, 396 F. Supp. 2d 665, 671 (E.D. Va. 2005) (Doumar, J.) ("Indeed, when a question of state law presents an issue of first impression, or if a possible interpretation might have the result of

creating new law, a federal court must err on the side of restraint."). In other words, "[t]he privilege (or duty) of changing the law belongs to the [state] courts or legislature." *Jackson*, 781 F.2d at 397.

When faced with an issue that the state's supreme court has not directly addressed, the federal court must consider "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending to *convincingly* show how the highest court in the state would decide the issue at hand." *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 663 (3d Cir. 1980)(emphasis added). This is not one of those cases.

Pennsylvania has long followed § 402A in all strict liability claims, and all Pennsylvania courts are required to apply the intended use doctrine and its intended user requirement. Just six years ago, in *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (2003), the Pennsylvania Supreme Court unambiguously stated:

> We conclude in a strict liability design defect claim, the plaintiff must establish that the product was unsafe for its intended user. We also explicitly state that a manufacturer will not be held strictly liable for failing to design a product that was safe for use by any reasonably foreseeable user as such a standard

> would improperly import negligence concepts into strictly liability law.

Id. at 1007.

Because the plaintiffs in *Phillips* did not establish that the allegedly defective cigarette lighter was unsafe for its intended users, the Pennsylvania Supreme Court held that their strict liability claim was barred as a matter of law under § 402A. *Id.* In that case, no plaintiff was able to maintain a claim of strict liability. The court did not draw a distinction (as the court of appeals did in this case) between those plaintiffs who were "unintended users" of the product, or plaintiffs who were "bystanders" to the underlying accident. *Id.* [3]

Phillips reaffirmed two long-standing aspects of Pennsylvania law: (1) that strict liability is governed by § 402A, which focuses on whether a product was made safe for its intended use by an intended user; and (2) that negligence concepts have no place in strict liability actions. This rule applies uniformly in Pennsylvania and without any recognized exception relevant here.

Nevertheless, when presented with a straightforward application of the intended use doctrine, the court of appeals here declined to follow Pennsylvania law. Instead, the panel certified, *sua sponte*, the question whether under Pennsylvania

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[3] In *Phillips*, two "bystanders" were killed in the apartment fire that gave rise to the underlying lawsuit, which was allegedly caused by the defective cigarette lighter. *Phillips*, 576 Pa. at 649, 841 A.2d at 1003.

law "a plaintiff minor child may pursue a strict liability claim for injuries caused by a riding lawnmower, where that child is neither an intended user nor consumer of the mower." The Pennsylvania Supreme Court declined to accept certification, with two justices stating that ". . . *this Court has sent a clear signal that the intended-use doctrine is to be construed narrowly*" until the Pennsylvania Supreme Court decided otherwise. Pet. App. 127a (emphasis added). Rather than heed this advice and leave the determination of Pennsylvania law to Pennsylvania's courts, the court of appeals improperly "imposed [its] own view of what [Pennsylvania] law should be[.]" *Koppers Co., Inc. v. The Aetna Casualty and Surety Co.*, 98 F.3d 1440, 1445 (3d Cir. 1996) (Stapleton, J.).[4]

What happened next is also remarkable. In its decision, the panel boldly proclaimed that the "time has come" to adopt the Third Restatement, because in the panel's opinion, the Third Restatement takes a progressive, "far more realistic," and more logical approach to strict liability. But later, when squarely presented with that issue in *Bugosh v. I.U. N. Am., Inc.*, the Pennsylvania Supreme Court declined to rule.

In their Dissenting Statement, Justices Saylor and Castille highlighted an additional, fundamental

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[4] Curiously, in making its decision, the panel quoted Justice Saylor's concurring opinion in *Phillips* at length, and ruled that it "foreshadows" the Pennsylvania Supreme Court's adoption of the Third Restatement. At the same time, however, the court failed to acknowledge Justice Saylor's message *in this case* that any change in current Pennsylvania strict liability law should come only from the Pennsylvania Supreme Court.

error in the panel's precedential opinion. Specifically, they rejected the panel's second prediction that the Pennsylvania Supreme Court would apply the Third Restatement retroactively, including in this case.

As a result, Pennsylvania's strict product liability scheme is more confusing to litigants and the courts. So long as the court of appeals' decision stands, two incompatible schemes of strict products liability will coexist in Pennsylvania, depending on whether the litigant is in state or federal court.

In the Commonwealth's courts, recovery in strict liability will remain limited to those who are intended users of the allegedly defective product, whereas federal district courts sitting in diversity will be required to apply the much more expansive version of strict products liability law in the Third Restatement. Litigants who are not "intended users" of an allegedly defective product, such as the plaintiffs in *Phillips v. Cricket Lighters* (denied recovery on a strict liability theory by the Pennsylvania Supreme Court in 2003) will now be entitled to a jury trial on their strict liability claims by categorizing themselves as "bystanders" if there is diversity of citizenship between the parties.

In making determinations in these cases, the federal district courts will be required to draw a line between "foreseeable" or "reasonable" and "unforeseeable" or "unreasonable" bystanders, thereby injecting negligence concepts into the strict

liability determination.[5] While that is permissible under the Third Restatement, it is entirely improper under current Pennsylvania law. *See Phillips, supra* (explaining that concepts of negligence and foreseeability have no place in a Pennsylvania case based on strict liability); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 94-95, 337 A.2d 893, 899 (Pa. 1975) (Jones, C.J.) (holding that it is improper in Pennsylvania to inject negligence concepts into a strict liability case).

Simplicity is not asking this Court to choose a side on the proper direction of Pennsylvania products liability law. Quite the opposite. Simplicity is respectfully urging this Court to vacate the court of appeals' precedential decision, consistent

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[5] Unlike Pennsylvania, jurisdictions that have abandoned the "intended user" prong of § 402A in favor of a negligence-based standard broadly hold manufacturers liable for injuries to any member of the public, including bystanders, who could "foreseeably" or "reasonably" be injured from an allegedly defective product. *See, e.g., Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 586, 451 P.2d 84, 89 (Cal. 1969) (allowing bystanders and non-users to recover because they are foreseeable risks to a maker's enterprise); *Mitchell v. Miller*, 26 Conn. Supp. 142, 149-50, 214 A.2d 694, 698-99 (Conn. Super. Ct. 1965) (abandoning intended user requirement in favor of foreseeability or reasonableness standard); *Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37, 39 (Fla. 1988) (allowing "foreseeable bystanders" to bring strict liability claims); *Court v. Grzelinski*, 48 Ill. App. 3d 716, 721-22, 363 N.E. 2d 12, 15 (1st Dist. 1977) (explaining strict liability extends to "members of the public who could foreseeably be injured" by an allegedly defective product); *Davis v. Gibson Prod. Co.*, 505 S.W.2d 682, 691 (Tex. Ct. App. 1973) ("The element of foreseeability has been stressed in cases allowing recovery by bystanders."); *Straub v. Fisher*, 1999 UT 102, 990 P.2d 384, 390 (Utah 1999) (same).

with *Erie R.R. Co. v. Tompkins*, in order to place the power to shape Pennsylvania law back into the hands of the Pennsylvania courts and legislature.

II. FEDERALISM AND COMITY CONCERNS REQUIRE THAT A STANDARD BE PRONOUNCED GOVERNING THE PRECEDENTIAL WEIGHT THAT FEDERAL COURTS SHOULD GIVE A STATE SUPREME COURT'S DENIAL OF CERTIFICATION AND STATEMENTS ISSUED IN RESPONSE TO CERTIFIED QUESTIONS.

Certification allows federal courts to avoid having to make unnecessary predictions concerning unsettled areas of state law. It allows a federal court to give a state supreme court the opportunity to decide limited issues of law before the federal court that are unsettled in the state. Certification recognizes that state supreme courts are the final arbitrators of state law.

Forty-seven states, the District of Columbia, and Puerto Rico, provide certification procedures. The certification process is, thus, integral to promoting harmonious cooperation between federal and state courts because it avoids the dual dangers of federal court speculation and federal court imposition of uniquely federal perspectives that could lead to misinterpretation of state law issues. Simply put, "[c]ertification respects and promotes

the core principles of judicial federalism." *Shirley v. Russell*, 69 F.3d 839, 844 (7th Cir. 1995).

For the certification process to work optimally, there should be clear guidelines instructing federal courts on how to interpret the responses of state supreme courts to requests to answer certified questions. Without a clear standard in place, federal courts may interpret responses in inconsistent manners, leading to incongruent results. This guidance is especially needed when a federal court is left to interpret a state supreme court's decision to decline answering a certified question.

Unquestionably, federal courts view answers to certified questions as authoritative pronouncements of state law. *See Amaro v. Capital One Bank*, No. 97 C 4638, 1999 U.S. Dist. LEXIS 966 (N.D. Ill. Feb. 1, 1999) ("the factor that weighs most strongly in favor of certification is that the procedure will yield an authoritative interpretation of [state law]"); *see also Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990) ("An important difference between interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative."); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) ("Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and help build a cooperative judicial federalism.'") (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). It is unclear, however, what interpretation federal courts should give to a state supreme court's decision to decline to

answer certified questions. Some federal courts of appeals have viewed a state supreme court's decision to decline certification as an indicator to exercise judicial restraint. At least one federal district court has viewed such decisions as an opportunity to make new law for the state. Simplicity believes that the better approach is to set forth standards that require courts of appeals to exercise restraint and afford deference to state supreme courts. Otherwise, competing and contradictory versions of the same state's common law will arise, as we have in this case.

For instance, in *Stephan v. Rocky Mountain Chocolate*, 136 F.3d 1134 (7th Cir. 1998), the United States Court of Appeals for the Seventh Circuit interpreted the Colorado Supreme Court's decision to refuse certification as an instruction to exercise judicial restraint. In *Stephan*, the Seventh Circuit certified the question of whether under Colorado law a default judgment resulted in issue preclusion. *Id.* at 1135. The Colorado Supreme Court declined to accept the certification, without explanation. *Id.* Before rendering its decision, the Seventh Circuit stated that it was "tempted to attribute some meaning to the Colorado Supreme Court's refusal of [its] certified question." *Id.* at 1137. Ultimately, though, it determined that this refusal without explanation had "no precedential significance." *Id.*

Without explicit guidance from the Colorado Supreme Court, the Seventh Circuit turned to Colorado appellate court decisions for authority. In light of those decisions, the Seventh Circuit held

that under Colorado law a default judgment did result in issue preclusion. *Id.* at 1139. The Seventh Circuit rendered its decision despite acknowledging that the majority of federal courts had adopted the Restatement's approach, which prescribed that default judgments do not result in issue preclusion and that this approach may be the "better rule." *Id.* The Seventh Circuit emphasized, however, that the Colorado Supreme Court had not overruled these appellate decisions despite having the opportunity to do so, and that therefore "any change in Colorado law should come from a Colorado court." *Id.*

Similarly, in *Jackson v. Johns-Manville Sale Corp.*, 781 F.2d at 397, the United States Court of Appeals for the Fifth Circuit plainly pronounced that "the denial of certification does not give [a federal court] license to change [state] law." In *Jackson*, the Fifth Circuit certified three questions to the Mississippi Supreme Court. The Mississippi Supreme Court declined, without discussion. *Id.* at 396. Faced with the dilemma of how to go forward in light of this denial, the Fifth Circuit made clear that while the "denial of certification force[d it] to make the *Erie*-guess [it] sought to avoid, [] it [did] not enable [the court] to alter existing law or to change direction." *Id.* at 397.

In contrast, in *Odgers v. Ortho Pharmaceutical Corp.*, 609 F. Supp. 867 (E.D. Mich. 1985), the Eastern District of Michigan used the Michigan Supreme Court's denial of certification as an opportunity to change existing Michigan law in complete contravention of direct evidence from the Michigan Supreme Court's own reluctance to do so.

In *Odgers*, the Michigan Supreme Court declined to answer the federal court's certified question, stating that it believed the state's legislature was better positioned to decide the unsettled area of law. *Id.* at 870. Unsatisfied with the response, the district court unilaterally determined that the Michigan Supreme Court's deference to the state's legislature was "clearly excessive." *Id.* As such, the district court stated that the "portion of the [opinion] which indicate[d] that [the] issue might best be left to the legislature [could] be discounted" and therefore was "not an obstacle to [the district court] answering the question." *Id.* Consequently, the district court took it upon itself to pioneer a new area of state law despite clear indication from the state's supreme court that it would not have done the same if presented with the same exact issue.

This case illustrates the infraction on state sovereignty that can result when there is no standard in place to guide federal courts on how to view a state supreme court's denial of a request to answer a certified question. Indeed, the situation could not be more clear. For over thirty years, Pennsylvania's strict liability jurisprudence has consistently followed § 402A of the Second Restatement. No Pennsylvania case has ever held otherwise. Moreover, when the Pennsylvania Supreme Court declined to answer the court of appeals' certified question in this case, two of its justices issued a Concurring Statement clearly and specifically reinforcing that, whatever the court of appeals' view may be, § 402A applies to strict liability claims in Pennsylvania. Yet, in the face of longstanding precedent, and even with the explicit

guidance of two justices in response to the request for certification, the court of appeals ignored these unambiguous indicators that the Pennsylvania Supreme Court desired to retain the power and authority to guide Pennsylvania law.

In other words, the court of appeals here unilaterally overruled longstanding Pennsylvania precedent in the absence of the clear and convincing evidence needed to hold that the state's supreme court would reject its prior decisions. Because there are no standards elucidating how responses to certification should be handled, the court was able to impinge upon Pennsylvania's sovereignty and change Pennsylvania law in violation of the principles of federalism. Instead, this Court should use this case to instruct the courts of appeals that, as in *Stephan* and *Jackson*, the courts of appeals should decline to predict a change in state law when the state supreme court refuses to accept certification of a question intended to determine if state law should be changed.

With certification available in almost every state, the need for clarification on the process is great. Standards must be set to avoid the type of injustice presented in this case. Accordingly, in light of the foregoing, Simplicity urges this Court to set forth guidelines that require the federal courts to give deference to the statements of state supreme courts in response to requests to answer certified questions.

CONCLUSION

For the reason set forth herein, the petition for certiorari should be granted.

Respectfully submitted,

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August 17, 2009

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OFFICE OF THE CLERK

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FOR THE THIRD CIRCUIT
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RE: Berrier, et al v. Simplicity Mfg Inc
Case Number: 05-3621
District Case Number: 04-cv-00097

ENTRY OF JUDGMENT

Today, **April 21, 2009** the Court has entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Page Limits:
15 pages

Attachments:
a copy of the panel's opinion and judgment only. No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. If separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to a combined is

page limit. If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed.R.App.P. 41. Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

By: */s/ Anthony W. Infante*
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267-299-4916

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3621

WAYNE BERRIER; BRENDA GREGG, in their own right and as parents and natural guardians of Ashley Berrier, a minor,

Appellants

v.

SIMPLICITY MANUFACTURING, INC.,

Third-Party Plaintiff

v.

SUSIE SHOFF; MELVIN SHOFF,

Third-Party Defendants

Appeal from the United States District Court
for The Eastern District of Pennsylvania
(Civil Action No. 04-cv-00097)
District Judge: Han. Legrome D. Davis

Argued: January 8,2007

Before: McKEE, AMBRO, and FISHER
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on January 8, 2007.

On consideration whereof, it is hereby ORDERED AND ADJUDGED by this Court the order of the district court entered June 30, 2005, granting summary judgment to Simplicity on the strict liability and negligence claims, is vacated and the matter is remanded to the district court for further proceedings consistent with this opinion. All of the above in accordance with the opinion of this Court.

Costs taxed against appellees.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: 21 April 2009

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 05-3621

WAYNE BERRIER; BRENDA GREGG, in their own right and as parents and natural guardians of Ashley Berrier, a minor,

Appellants

v.

SIMPLICITY MANUFACTURING, INC.,

Third-Party Plaintiff

v.

SUSIE SHOFF;
MELVIN SHOFF,

Third-Party Defendants

Appeal from the United States District Court
for The Eastern District of Pennsylvania
(Civil Action No. 04-cv-00097)

District Court: Hon. Legrome D. Davis

Argued: January 8, 2007

Before: McKEE, AMBRO, and FISHER
Circuit Judges

(Opinion filed: April 21, 2009)

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OPINION

McKEE, Circuit Judge.

The primary issue in this appeal is whether Pennsylvania's strict products liability law extends to a child who was injured when her grandfather backed over her foot while using a riding mower that lacked "back-over" protection. The Pennsylvania Supreme Court has never expressly determined if one who is merely a bystander and not a user of a product can bring a products liability claim against a manufacturer to recover for injuries that occur while an intended user is using the manufacturer's

product. We predict that if the Pennsylvania Supreme Court were confronted with this issue, it would adopt the Restatement (Third) of Torts, §§ 1 and 2, and thereby afford bystanders a cause of action in strict liability under the circumstances here.[1] Accordingly, we will reverse the district court's grant of summary judgment in favor of the manufacturer on the strict products liability claim. We will also reverse the district court's grant of summary judgment in favor of the manufacturer on the plaintiffs' negligence claim.

I. FACTS

A. The Accident

Wayne Berrier and Brenda Gregg are the parents of Ashley Berrier, a minor. On May 7, 2003, Ashley was visiting her grandparents at their home in Honeybrook, Pennsylvania. Her grandfather, Melvin Shoff, was mowing his yard with his Simplicity Regent Model riding mower. Shoff had purchased the mower new from a retailer in 1994.

According to Shoff, Ashley came into the yard and attempted to hand him a flower while he was mowing. Shoff disengaged the mower blades and told her to go inside. Believing she had done as instructed, Shoff then re-engaged the blades and placed the mower in reverse to turn the mower around. As he was backing up with the blades engaged, he backed over Ashley's left leg. Although

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[1] For convenience, we will frequently refer to the Pennsylvania Supreme Court as the "Supreme Court," or the "Court."

Ashley received prompt medical attention at a prominent children's hospital, her left foot had to be amputated.

Thereafter, Ashley's parents brought this action in their own right and on Ashley's behalf (plaintiffs are collectively referred to as the "Berriers") against Simplicity. They argued that Simplicity was liable for negligently designing the mower and also strictly liable because the design was defective. Both claims centered on the absence of any back-over protection, such as a "no mow in reverse" device or roller barriers.

The Simplicity mower Shoff was using was a Regent 12 HP Hydrostatic lawn tractor, model number 1692403. It had been manufactured in 1994 and was equipped with a 36- inch steel mower deck that housed two rotating blades. The mower was intended to be operated only by an adult and designed accordingly. The operator could control the mower's movement and blade engagement. The operator could therefore move the mower forward or in reverse, with or without the blades engaged. The blades could be engaged or disengaged using a "PTO [power take off] lever" on the left side of a control panel. No physical barriers obstructed the operator's view. Information that accompanied the mower clearly warned that it should not be operated while anyone was within the mower's area of operation.

Simplicity equipped the mower with three electrical safety systems to prevent the engine from starting unless the transmission and blade controls are in "stopped" positions. This stopped the engine

and blades if the operator left the seat without disengaging the blades, and the configuration automatically stopped the engine if the operator left the seat without first setting the parking brake. However, the mower was not equipped with any "no mow in reverse" ("NMIR") device nor any kind of roller barrier at the rear of the mowing deck.[2]

The mower came equipped with warnings and instructions printed in bold black letters against a yellow background, located at the operator's position on the machine that warned of "serious injury or death" that could occur if the machine was operated "WHEN CHILDREN OR OTHERS ARE AROUND." Additional warnings and safety rules pertaining to the danger of amputation and the risk of accident were placed on the deflector shield. Similar warnings were also printed in the Operator's Manual, and Shoff admitted that he read and understood them.

B. History of Back-Over Protection on Riding Mowers

In the 1970's and 80's, a series of studies warned about the extreme dangers associated with operating riding mowers in reverse with blades

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[2] The NMIR is a general category of devices that are broadly defined as mechanisms that would either: (a) prevent a mower's blades from remaining on if the mower is shifted into reverse; (b) stop the engine and/or blade(s) when the mower is changed to reverse; or (c) prevent reverse motion when the mower blade is engaged. *See* App. at 732 (Berrier's Expert Report); *see also* App. at 576 (Simplicity inter-office correspondence regarding NMIR standard). Roller barriers provide an alternative method for back-over protection. They are described more fully below.

engaged. These studies were conducted by the Consumer Product Safety Commission ("CPSC")[3] and others. The studies cited back-over blade contact accidents, comprising between nine and eleven percent of reported accidents involving riding mowers, as the most tragic type of lawnmower accidents. These accidents almost always involved children under the age of five, and almost always resulted in amputation or death. Calculations based on these studies demonstrated that back-over accidents happened at a rate of more than 100 per year, and one such accident occurred for each 5-6,000 riding mowers sold in the United States. App. 550, 555. In December of 1974, a study commissioned by the CPSC recommended that all riding mowers be equipped with a mechanism that would automatically stop the blade while the mower was in neutral or reverse. The Consumers' Union of the United States ("CU") echoed the call for this requirement in a proposed standard issued on July 17, 1975.[4]

In 1977, the CPSC published a "Proposed Safety Standard" in the Federal Register that would have required all riding mowers to include back-over protection in the form of a device that would disengage the blades while the mower was in reverse. In 1984, following requests from the industry trade association, certain sections of the

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[3] The CPSC is the government agency charged with protecting the public from unreasonable risks of serious injury or death from various types of consumer products.

[4] The Consumer's Union is a nonprofit consumer research organization that is probably best known for its publication of "Consumer Reports Magazine."

proposed mandatory CPSC requirements were withdrawn. The withdrawn sections included the requirement that an NMIR device be incorporated into the design of riding mowers. The withdrawal was premised on the CPSC's belief that a voluntary standard developed by the industry with comment and assistance by the CPSC would be "a more efficient use of the commission's resources." App. 575.

Nonetheless, the CPSC continued to recognize that "based on engineering judgment, riding mowers meeting these requirements [including reverse operations with the blade disengaged] should be safer than those that do not." App. 576. Accordingly, the CPSC sent a letter to the Outdoor Power Equipment Institute ("OPEI") requesting that an NMIR feature with an option for manual override be included in any revised American National Standards Institute ("ANSI") standard for riding mowers.[5] The Commission's rationale included the following statement:

> These provisions offer a reasonable means to begin to address young children backed over during reverse mowing. While these accidents are infrequent, the population at risk and the severe mental trauma to the child's family fully support the need to take immediate steps . . . . Overall, the requirement can address the serious

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[5] The OPEI is the industry trade group that drafted the ANSI safety specifications for riding mowers. App. 209.

> back up hazard while still permitting maximum freedom to designers.

App. 548-49.

In 1994, the CPSC further articulated industry concerns regarding the efficacy of NMIR devices, including issues relating to how fast the blade should stop to avoid blade contact injuries, whether consumers would accept a mower that does not mow while backing up, and whether the safety change could be incorporated into the product without diminishing customer satisfaction. Those and similar concerns ultimately lead to the defeat of attempts to incorporate a mandatory NMIR design into riding mowers.

C. The Effectiveness of Back-Over Protection Devices

In the wake of discussions about lawn mower design, different types of NMIR devices have been designed to prevent the motor from powering the blade if an operator shifts a riding mower into reverse.[6] In fact, in 1976, Simplicity received two patents for mechanical and electrical interlocks that

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[6] These devices include: (1) a blade brake which stops the blades each time the mower is shifted into reverse; (2) automatically stopping the engine if the mower is shifted into reverse without the operator disengaging the blades; (3) automatically locking the wheels if the blade is still spinning while the mower is shifted into reverse; and (4) an interlock which prevents the mower from being shifted into reverse if the blades are spinning. App. 556-58.

prevent blades from spinning while a riding mower is backing up. App. 588-89.

NMIR devices often include an "override" feature that conditions reverse mowing upon a series of maneuvers (*e.g.*, an override button) that compel the operator to focus his/her attention on backing up and take some action to power the blades while the mower is operating in reverse. However, even with such an option, the blades will automatically stop when the mower is shifted into reverse in normal operation. App. 557.

In 2003, the new ANSI standards, drafted by OPEI, required an NMIR design. App. 578-80. Thereafter, in September 2004, Simplicity incorporated NMIR devices into its riding mowers.[7]

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[7] Rule 56 of the Federal Rules of Civil Procedure requires that only admissible evidence be offered in summary judgment proceedings. Evidence of subsequent remedial measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. Fed. R. Evid. 407. However, subsequent remedial measures need not be excluded if, as here, they are introduced for the purpose of demonstrating the feasibility of the design. *Id.* The district court did not discuss this evidence, nor explain why it was not considered.

The Product Liability Advisory Council, *Amicus Curiae* in support of Simplicity, contends in a footnote that Berrier's evidence of subsequent design changes as well as subsequent (ANSI) industry standards, is inadmissible to show negligence and strict liability. It cites *Duchess v. Langston Corp.*, 769 A.2d 1131, 1145 (Pa. 2001) (recognizing that the general proscription against the admission of evidence of subsequent remedial measures precludes use of a subsequent design change as substantive evidence of a product defect in a strict products liability case), and *Lewis v. Coffing Hoist Division*, 528 A.2d

D. Alternative Designs Suggested by the Berriers

The Berriers suggest several alternative designs that could have been incorporated into Simplicity's mower. The first is an NMIR feature that prevents the blades from being powered by the motor when the mower is shifted into reverse. App.

590, 594 (Pa. 1987) (industry standards are inadmissible in strict liability), in support of its position.

However, there are several reasons why this evidence can be considered. First, the Council is correct that Pennsylvania law generally prohibits the admission of evidence of subsequent remedial measures, including the use of a subsequent design change as substantive evidence of a product defect in a strict products liability case. *See Duchess* at 1145. However, like the Federal Rule governing admissibility, where the machine manufacturer places feasibility in issue, exceptions in the rule governing subsequent remedial measures are admissible to establish the feasibility of the alternate design. *Id.* at 1150; *see also* Pa. R. Evid. 407 (excepting from the rule evidence that proves controverted matters including feasibility of precautionary measures).

Second, the "industry standard" evidence excluded in *Lewis* was offered by the defendants as part of their defense to a strict liability claim. *See LaBelle ex rel. LaBelle v. Philip Morris, Inc.*, 243 F. Supp. 2d 508, 520 (D.S.C. 2001) (distinguishing *Lewis*, 528 A.2d 590). *Lewis* does not address whether industry standard evidence is inadmissible in a design defect claim based on a negligence theory, nor does it hold that the safety designs available at the time of manufacture have no relevance to a strict liability design defect claim. For the Berriers to sustain their negligence claim, they must show that Simplicity failed to exercise due care. Evidence of alternate designs is admissible to refute Simplicity's claim that NMIR devices would decrease the social utility of the mower, *see* Pa. R. Evid. 407, as well as to show the "state of the art" of safety design at the relevant time. *See Phatak v. United Chair Co.*, 756 A.2d 690, 693 (Pa. Super. 2000). The evidence may be similarly relevant to the Berriers' strict liability theory.

374. However, even with loss of power, momentum causes the blades to continue to spin for a short time as the mower is backing up. *Id.* The feature requires disengagement and re-engagement of the blades each time the mower reverses direction. App. 35. This design was being used by one lawn mower manufacturer, MTD Products Inc., when Shoff's mower was manufactured.[8] App. 767.

The Berriers also suggest an NMIR feature that utilizes the aforementioned "override" switch that would allow the operator to choose to mow in reverse as needed or for an entire mowing session. ("Override Device") App.. 375. This design is now required by the 2003 ANSI standards. App. 579.

The final alternative design suggested by the Berriers is roller-guards on the back of the mowing deck. They create a barrier that greatly reduces the risk of any "foreign object" slipping under the deck (*i.e.* blade housing) as the mower is backing up. A Simplicity engineer and the Berriers' design expert both testified that roller-barriers reduce injuries. App. 593-96, 553-54. In fact, Simplicity asked OPEI to adopt this design based on testing it had conducted that supported the effectiveness of the roller-barrier in preventing back-over injuries.[9] App. 593-94, 597-98.

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[8] We will therefore refer to this feature as the "MTD design."

[9] Roller barriers function much the same way as the old "cow catcher" that used to be designed into the front of railroad locomotives to sweep any foreign objects from railroad tracks in advance of the engine to which it was attached.

II. DISTRICT COURT PROCEEDINGS

Following Ashley's injury, the Berriers filed this action against Simplicity in the Court of Common Pleas of Philadelphia County. The complaint contained one count of strict products liability based on Section 402A of the Restatement (Second) of Torts (Count I), and a second count sounding in negligence (Count II). As noted earlier, both counts alleged a cause of action based on an allegedly defective design.[10]

Simplicity removed the case to the district court based on diversity of citizenship, 28 U.S.C. § 1332, and filed an answer. Sometime thereafter, Simplicity filed a third-party complaint against Mr. and Mrs. Shoff, which was later amended, alleging claims of negligent supervision and of failure to follow instructions. Simplicity's third-party complaint sought contribution from the Shoffs in the event that it was found liable.

In time, Simplicity and the Shoffs, the third-party defendants, filed motions for summary judgment. Simplicity sought summary judgment on

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[10] The complaint also asserted that the warnings on the mower were defective. The district court wrote that it "fail[ed] to understand what additional warnings would be more effective in preventing back-over accidents." *Berrier v. Simplicity Corp.*, 413 F. Supp.2d 431, 446 (E.D. Pa. 2005). Indeed, it noted that the Berriers' own expert testified at his deposition that additional warnings, both in the manual and on the mower, would not, standing alone, be effective in preventing future accidents. *Id.* The Berriers do not assert in this appeal that the warnings were defective.

the strict liability and negligence claims. The Shoffs sought partial summary judgment on the negligent supervision and failure to follow instructions contribution claims.

The district court granted summary judgment to Simplicity on both counts and dismissed the Berriers' complaint. *Berrier v. Simplicity Corp.*, 413 F. Supp.2d 431 (E.D. Pa. 2005). The court ruled that Pennsylvania strict products liability law does not permit recovery for injuries to anyone other than the intended user. Because Ashley was a bystander and not an intended user of the mower, she could not recover in an action against Simplicity. *Id.* at 437-43. Since the court also concluded that, under Pennsylvania law, Simplicity did not owe a duty to bystanders, it dismissed the negligence claim as well. *Id.* at 443-49.

The court also ruled that the award of summary judgment "moots the contribution claim against [the Shoffs], and, hence, the need to resolve [the Shoffs'] motion for summary judgment." 413 F. Supp.2d at 449. Nonetheless, it decided the Shoffs' motions "in the event plaintiffs are successful on a motion for reconsideration or on appeal, and because Simplicity has not argued for dismissal based on mootness." *Id.* The court then denied the Shoffs' motion for summary judgment on Simplicity's negligent supervision claim, but granted summary judgment in favor of Mrs. Shoff only on Simplicity's failure- to-follow-instructions claim. *Id.* at 449-52.

This appeal followed.

III. JURISDICTION & STANDARD OF REVIEW

The district court had diversity jurisdiction pursuant to 28 U.S.C. § 1332. We have jurisdiction pursuant to 28 U.S.C. § 1291. "The standard of review applicable to the District Court's order granting summary judgment is plenary." *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 466 (3d Cir. 2005). We apply "the same test employed by the District Court under Federal Rule of Civil Procedure 56(c)." *Id.* The non-moving party "is entitled to every favorable inference that can be drawn from the record." *Id.* At the summary judgment stage, "the judge's function is not . . . to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp.*, 812 F.2d 141, 144 (3d Cir. 1987).

IV. DISCUSSION

A. Bystander Recovery Under Pennsylvania's Strict Products Liability Law.

The district court relied primarily upon *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003), in holding that Ashley could not recover in strict liability under Pennsylvania law because she was not an intended user of the mower. However, as we discuss in detail below, we believe the district court's reliance on *Phillips* was misplaced because bystander liability was not an issue in that case; moreover, no other decision of the Court specifically addresses the issue.

In the absence of a controlling decision by the Pennsylvania Supreme Court, a federal court applying that state's substantive law must predict how Pennsylvania's highest court would decide this case.[11] *See Nationwide Mutual Ins. Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir. 2000). "In predicting how the highest court of the state would resolve the issue, [we] must consider 'relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.'"[12] *Id.* (quoting *McKenna v. Ortho Pharm Corp.*, 622 F.2d 657, 663 (3d Cir. 1980)). Although the Pennsylvania Supreme Court has not yet expressly recognized a bystander's right to recover under products liability law, it has not expressly rejected such a claim either.

The "modern era" of products liability law in Pennsylvania began with *Webb v. Zern*, 220 A.2d 853 (Pa. 1966). There, Webb's father bought a keg of beer from Zern (a beer distributor), and Webb's brother subsequently tapped the keg and drew beer from it. Webb was injured when the keg exploded. *Id.* at 426. Webb relied on a theory of "exclusive control" to sue

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[11] Because we are sitting in diversity, we must apply Pennsylvania's law to the facts of this case. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). All parties agree that Pennsylvania law governs this suit and the district court applied Pennsylvania law in granting summary judgment.

[12] The district court did not conduct a prediction analysis. However, we can do a prediction analysis because, had the district court conducted such an analysis, our review of that analysis would be plenary. *Nationwide Mutual Ins. Co. v. Bufetta*, 230 F.3d 634, 637 (3d Cir. 2000)

both Zern, the brewer who filled the keg, and the manufacturer of the keg. The trial court dismissed the action pursuant to the defendants' demurrers. That court ruled that the doctrine of exclusive control did not apply because Webb had not joined his father and brother and either or both of them could have done something that caused the explosion.

On appeal, the Supreme Court adopted the Restatement (Second) Torts, Section 402A as a "new basis of liability." *Id.* at 426-27. Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[13]

Restatement (Second) of Torts § 402A.

The Court did not fully explain its rationale for adopting Section 402A. Rather it simply referred to the concurring and dissenting opinions in *Miller v. Preitz*, 221 A.2d 320 (Pa. 1966), which was issued the same day as *Webb*, stating: "[o]ne will . . . find there citations to modern case law and commentaries which extend and recommend the extension of the law of strict liability in tort for defective products." 220 A.2d at 854.

In his concurring and dissenting opinion in *Miller*, Justice Jones recited the history of product liability law in Pennsylvania prior to *Webb*. *Miller*, 221 A.2d at 328-35 (Jones, J., concurring in part and dissenting in part). He explained that a person injured by a defective product could sue either in negligence or in assumpsit based upon a breach of implied warranty arising from the sale of an allegedly defective product. *Id.* at 329. However, under either theory the injured person was required to establish privity, *id.* at 329, 330, and, in a negligence action, the injured person had to prove the specific acts of negligence by the manufacturer. *Id.* at 330.

In his recitation, Justice Jones noted that following the landmark case of *MacPherson v. Buick*

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[13] The term "seller" includes the "manufacturer" of a product. Restatement (Second) of Torts, § 402A, cmt. *f*.

Motor Co., 111 N.E. 1050 (N.Y. 1916), Pennsylvania had eliminated the requirement of privity in negligence actions for damages arising from a defective product. *Id.* at 329. However, in an assumpsit action based on a breach of warranty, privity was still required. *Id.* at 330. As a result of the privity requirement, a manufacturer's liability in a breach of warranty action was limited to his immediate purchaser, who was generally a retailer who sold the product directly to the consumer. *Id.* at 332. The retailer was therefore normally only liable to the actual purchaser and not to subsequent users of the product. *Id.* at 332-33. Therefore, Justice Jones recommended abolishing the privity requirement, adopting Section 402A, and thereby allowing product liability actions in tort. *Id.* at 333. He explained that the adoption of Section 402A would protect the consuming public by forcing manufacturers to "stand behind their products," and make the "burden of injuries caused by defects in . . . products fall upon those who make and market the products." *Id.* at 334.

Although the Supreme Court in *Webb* did not expressly recognize a distinct cause of action for bystanders under Section 402A, *Webb* can be read as standing for the proposition that, under Pennsylvania law, there is a distinct cause of action for bystanders under Section 402A.[14] Webb was a bystander who simply had the misfortune of being in

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[14] A caveat to Section 402A states, in relevant part, that the American Law Institute "expresses no opinion as to whether the rules stated in this Section may not apply . . . to harm to persons other that users or consumers."

the same room as the keg when it exploded. Of course, it is possible that the Court viewed Webb as a user or consumer since he may well have walked into the room to draw beer from the keg. However, the Court did not rely upon any such status in allowing Webb to amend his complaint to include a cause of action under Section 402A, and nothing in the opinion suggests that the Court was concerned with whether Webb was a user of the keg.[15]

Eight years after *Webb*, the Court decided *Salvador v. Atlantic Steel Boiler Co.*, 319 A.2d 903 (Pa. 1974). There, an employee was severely injured when a steam boiler exploded at his place of work. He brought an assumpsit action against his employer, the retailer of the boiler and its manufacturer. *Id.* at 904. The trial court dismissed the complaint because the employee had not alleged a contractual relationship with the defendants and thus horizontal privity was lacking.[16] *Id.* On appeal,

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[15] No further history of the case is available. Accordingly, we do not know what (if any) defenses were asserted on remand, nor do we know the ultimate outcome of the case.

[16] "Privity of contract is that connection or relationship which exists between two or more contracting parties." *Salvador*, 319 A.2d at 904 n.1. "Vertical privity refers to the relationship between those who are in the distributive chain of a product." Black's Law Dictionary 1200 (6th ed. 1990). "Horizontal privity". . . "is not, in reality, a state of privity but rather one of nonprivity. The term refers to those who are not in the distributive chain of a product but who, nonetheless, use the product and retain a relationship with the purchaser, such as a member of the purchaser's family." *Id.* at 1199.

In *Miller v. Preitz, supra*, the Pennsylvania Supreme Court reaffirmed the requirement of vertical privity in an action for breach of warranty in an action for injuries suffered

the Pennsylvania Superior Court reversed, and the Supreme Court subsequently affirmed the reversal. *Id.*

The Supreme Court noted that its earlier adoption of Section 402A in *Webb* eliminated the necessity of horizontal privity in breach of warranty cases. The Court explained:

> Today . . . a manufacturer by virtue of section 402A is effectively the guarantor of his product's safety. Our courts have determined that a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use. We have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by the defect. He may not preclude an injured plaintiff's recovery by forcing him to prove negligence in the manufacturing process. Neither may the manufacturer defeat the claim by arguing that the purchaser has no contractual relation to him. Why then

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through a breach of warranty. However, *Miller* was overruled by *Kassab v. Central Soya*, 246 A.2d 848 (Pa. 1968), which noted that the adoption of Section 402A in *Webb v. Zern*, *supra*, obliterated any logical basis for retaining the demand for vertical privity. In *Salvador*, the Pennsylvania Supreme Court abolished the requirement for horizontal privity in breach of warranty actions. 319 A.2d at 907-08.

> should the mere fact that the injured party is not himself the purchaser deny recovery?

Id. at 907 (citations omitted).

Significantly, although the action was for breach of warranty, the Court focused on the safety of the product rather than the status or the contractual relationship of the parties.[17] It reasoned that because Pennsylvania products liability law "*has progressed,*" the demands of public policy "as well as legal symmetry compel" the conclusion that lack of horizontal privity did not bar the employee's action against the manufacturer for breach of warranty. *Id.* at 907-08 (emphasis added). Essentially, the Court held that relief available in breach of warranty claims should be as broad as that available under Section 402A.

Salvador involved an employer-employee relationship, and Section 402A treats an employee as a user of a product. *See* Restatement (Second) of Torts, § 402A, cmt. *l*. However, as in *Webb*, the Court in *Salvador* neither discussed the employee's status nor suggested that his status as an employee was determinative.[18] Rather, the Court focused on the safety of the product.[19]

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[17] It is not clear why the action was brought in assumpsit rather than tort, as § 402A had been the law in Pennsylvania for eight years.

[18] The Superior Court expressly acknowledged the employer-employee context of the dispute. It wrote: "We believe that the injured employee stands in the shoes of his employer and that his cause of action is based on implied warranty and is

Nevertheless, these Supreme Court cases do not specifically address a bystander's ability to sue under Section 402A. Accordingly, "[w]e give 'due regard' to the decisions of Pennsylvania's intermediate appellate courts as 'indicia of how the state's highest court would decide [the issue].'" *Nowak v. Faberge USA Inc.*, 32 F.3d 755, 759 (3d Cir. 1994) (citation omitted).

The Pennsylvania Superior Court allowed a bystander to sue in strict liability in *Pegg v. General Motors Corp.*, 391 A.2d 1074 (Pa. Super. 1978). Pegg was injured when riding in a car driven by a co-worker. Unbeknownst to Pegg, the coworker had placed a chemical used to sanitize swimming pools in the car. Pegg was injured when the chemical spontaneously ignited, *id.* at 1077, and he sued the manufacturer of the chemical (among others) under theories of negligence and strict liability. The Pennsylvania Superior Court held that he could recover even in the absence of privity. The court based liability on whether the manufacturer "place[d] a defective article in the stream of

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not barred by the shield of privity. The manufacturers know that most businesses are carried on through employees who will actually use the product purchased by their employers." *Salvador v. I.H. English of Phila., Inc.*, 307 A.2d 398, 402 (Pa. Super. 1973).

[19] The Berriers contend that a third Supreme Court case, *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914 (Pa. 1974), allows bystander recovery under Section 402A. There, an employee sued after being injured by objects falling from a crane at the job site. However, the manufacturer/seller there conceded that Kuisis was a "user" of the crane within the meaning of Section 402A. *Id.* at 919. The case therefore did not involve a "bystander."

commerce." *Id.* at 1079 (quoting *Salvador*, 319 A.2d at 970). Liability did not turn on the relationship between Pegg and the manufacturer.

However, since the Superior Court's decision in *Pegg*, the Supreme Court has issued opinions which appear to limit recovery under Section 402A to intended users. In *Azzarello v. Black Bros. Co., Inc.*, 391 A.2d 1020 (Pa. 1978), an employee's right hand was injured when it was pinched between two hard rubber rollers in a coating machine owned by her employer. The employee sued the manufacturer asserting only a cause of action for strict liability under Section 402A, and the manufacturer joined the employer as an additional defendant arguing that the employer's negligence caused the accident in whole or in part. The trial resulted in a verdict in favor of the manufacturer and the employee moved for a new trial, asserting, *inter alia*, that the trial judge incorrectly instructed the jury that her burden of proof under Section 402A required a showing that the machine was "unreasonably dangerous." *Id.* at 1022. On appeal to the Supreme Court, the employee won a new trial. The Court held that the trial court's use of "unreasonably dangerous" in the jury instructions had improperly introduced negligence concepts into the proceeding. *Id.* at 1025. The erroneous instruction

> burdened the injured plaintiff with proof of an element which rings of negligence. As a result, if, in the view of the trier of fact, the "ordinary consumer" would have expected the defective condition of a product, the

> seller is not strictly liable, regardless of the expectations of the injured plaintiff . . . .

Id. at 1025 (citation and quotation marks omitted).

The Court conceded that limiting liability to defects that are "unreasonably dangerous" "may . . . serve the beneficial purpose of preventing the seller from being treated as the insurer of its products." *Id.* (citation omitted). However, the Court thought that objective could better be achieved by requiring proof of "a defect in the manufacture or design of the product, and that such defect was a (legal) cause of the injuries." *Id.* (citation omitted) (parentheses in original).

The Court observed:

> The development of a sophisticated and complex industrial society with its proliferation of new products and vast changes in the private enterprise system has inspired a change in legal philosophy from the principle of caveat emptor which prevailed in the early nineteenth century market place to the view that a supplier of products should be deemed to be the guarantor of his products' safety. The realities of our economic society as it exists today forces the conclusion that the risk of loss for injury resulting from defective products should be borne by the suppliers, principally because they are

> in a position to absorb the loss by distributing it as a cost of doing business. In an era of giant corporate structures, utilizing the national media to sell their wares, the original concern for an emerging manufacturing industry has given way to the view that it is now the consumer who must be protected.[20]

Id. at 1023-24 (citation and internal quotation marks omitted).

The Court explained the evolution of Section 402A and the tension between strict liability and a common law cause of action for negligence. The Court noted that Section 402A initially applied "only to foodstuffs and the requirement was that the food be in a condition dangerous to the consumer." *Id.* at 1025 n.10. However, the present text of Section 402A was substituted for "dangerous" because of concerns "about liability for a product like whiskey, . . . because a jury might find that all whiskey is unreasonably dangerous to the consumer." *Id.* Accordingly, "[t]he word 'defective' was added to ensure that it was understood that something had to be wrong with the product." *Id.* Then, quoting from *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 902 (Pa. 1975), the Court declared: "[t]he seller must provide the product with every element necessary to make it safe for the intended use." 391 A.2d at 1027. The Court concluded that, "[f]or the term guarantor

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[20] Although the Court referred to "the consumer," given the context of that statement, it does not appear that the Court intended to limit that term to "users."

to have any meaning in this context the supplier must at least provide a product which is designed to make it safe for the intended use." *Id.* at 1027. However, since a jury could confuse that concept if instructed that the product must be "unreasonably dangerous," the Court agreed that the jury instructions were misleading. *Id.*

The Court also explained that "unreasonably dangerous," has no independent significance, but is a term of art that "merely represent[s] a label to be used where it is determined that the risk of loss should be placed upon the supplier." *Id.* at 1025. Moreover, the determination of whether the risk should be placed upon the supplier was a legal question that must be resolved by a court, not by the fact finder. *Id.* at 1025-26.

Therefore, the appropriate inquiry after *Azzarello* was whether the supplier had designed the product with every element necessary to make it safe for use. *Id.* at 1027. Under that standard, "a jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." *Id.* The Court also reaffirmed that the trial court must decide if "the utility of a product outweigh[s] the unavoidable danger it may pose." *Id.* at 1026. Thus "[r]estated, the phrases 'defective condition' and 'unreasonably dangerous' as used in the Restatement formulation are terms of art invoked [by a court] when strict liability is appropriate." *Id.*

It is therefore clear that, after *Azzarello*, strict liability under Section 402A involves a two-prong inquiry. As we explained in *Nowak*:

> Initially, the question of whether a product is defective, given the facts as alleged by the plaintiff, is a question of law to be answered by the trial judge. If the judge determines as a matter of law that Pennsylvania's social policy supports placing the risk of loss on the manufacturer in the situation alleged by the plaintiff, then the case goes to the jury for a determination as to whether the facts alleged by the plaintiff are true.

32 F.3d at 757 (internal quotation marks and citation omitted).

Although *Azzarello* assists our inquiry, it does not resolve it because it does not tell us the Court's view of *who* the product must be safe for, and that is the primary issue here. The Court addressed that issue in *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003). There, a majority of the Supreme Court held that a product must be made safe only for its intended user.

In *Phillips*, a two-year-old child accidentally started a fire after removing a butane lighter from his mother's purse and setting fire to some linens. The fire spread throughout the family's apartment, and resulted in the deaths of the two-year old child, his mother, and another minor. *Id.* at 1002-03. One

child managed to escape through an open window and survived. *Id.* at 1003. The administratrix of the decedents' estates, who was also the guardian of the child who survived, sued the manufacturer and distributor of the lighter, alleging, *inter alia*, strict liability for a defective design under Section 402A, as well as negligent design, because the lighter was not equipped with "childproof features." *Id.* The trial court granted summary judgment to the manufacturer on the Section 402A claim because the manufacturer only intended its lighter to be used by adults, and it was perfectly safe for use by adults.[21] *Id.*

The Superior Court reversed based on its belief that a product must be safe for anyone who uses it.[22] *Id.* at 1004. The Superior Court concluded that Cricket's lighter was defective because it was not equipped with a child safety feature that would have prevented a child from starting a fire. In the Superior Court's view, that defect exposed intended users to grave risk of harm. *Id.* The Supreme Court granted allocatur and reversed because it agreed with the trial court.

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[21] The trial court granted the defendants' motion for summary judgment on the negligent-design-defect claim, holding that when a product is found not defective for strict liability purposes, a negligent-design defect must also fail. 841 A.2d at 1003.

[22] As to the negligent-design defect claim, the Superior Court held that since it had found the trial court's decision on the strict liability claim to be error, it had to reverse the entry of summary judgment on the negligent-design defect claim. 841 A.2d at 1004. However, we are not concerned here with such a claim.

The majority in *Phillips* began by observing that *Azzarello* "did not answer . . . whether the 'intended use' doctrine necessarily encompasses the requirement that the product need be made safe only for its 'intended user.'" *Id.* at 1005. The majority explained that, although it had never faced that question in a strict liability design defect case, it had faced it in *Mackowick v. Westinghouse Electric Corp.*, 575 A.2d 100 (Pa. 1990), a case alleging strict liability for failure to warn. 841 A.2d at 1005.

In *Mackowick*, an electrician had sued to recover injuries caused by arcing electricity in a high voltage capacitor. He alleged that the capacitor was defective because it did not warn of the dangers of exposed electrical wires. The *Mackowick* Court "rejected that argument . . .[,] reason[ing] that a product need only be made safe for its intended user." *Phillips*, 841 A.2d at 1005 (citing *Mackowick*, 575 A.2d at 102, 103). The "electrical capacitor was intended to be accessed and used only by qualified electricians, and not general members of the public. As experienced electricians are aware of the dangers of live exposed electrical wires, [the *Mackowick* court] concluded that the product was safe for its intended user even absent a [specific] warning." *Id.* at 1005.

In applying the holding of *Mackowick*, the majority in *Phillips* reasoned:

> While *Mackowick* was a failure to warn case, . . . we cannot perceive how it could be confined exclusively to the failure to warn context. *Mackowick*

> stands for the proposition that a product is not defective so long as it is safe for its intended user. Whether the product is allegedly defective due to a lack of warnings, or because it was ill-conceived, the standard that the product need be made safe only for the intended user appears to be equally applicable.

Id.

The administratrix/appellee in *Phillips* argued that the lighter's design was defective because it was reasonably foreseeable that a child might play with it, and therefore the manufacturer should be liable under Section 402A whether the user was the intended adult or the foreseeable child. Although the majority conceded that the argument had "some visceral appeal," it noted that the visceral appeal "has been memorialized in our tort law as a negligence cause of action." *Id.* at 1006.

By the time *Phillips* was decided, the Court had drawn a clear distinction between negligence actions based on notions of foreseeability and a cause of action based on a theory of strict liability. The Court had often declared that "negligence concepts have no place in a case based on strict liability." *Id.* (quoting *Lewis v. Coffing Hoist Div., Duff- Norton Co., Inc.*, 528 A.2d 590, 593 (Pa. 1987)).

Nonetheless, the majority in *Phillips* conceded that even though the Court had "remained steadfast in . . . proclamations that negligence concepts should

not be imported into strict liability law, [it had] muddied the waters at times with the careless use of negligence terms in the strict liability arena." *Id.* at 1006-07 (citing *Davis v. Berwind Corp.*, 690 A.2d 186, 190 (Pa. 1997).[23]

The *Phillips* majority sought to clarify the law by clearly stating that a plaintiff bringing a claim for strict liability based on defective design under Section 402A "must [only] establish that the product was unsafe for its *intended* user." *Id.* at 1007 (emphasis added). "We also explicitly state that a manufacturer will not be held strictly liable for failing to design a product that was safe for use by any reasonably foreseeable user, as such a standard would improperly import negligence concepts into strict liability law." *Id.*

The Court reiterated the distinction between negligence concepts and strict products liability in *Pennsylvania Dept. of General Services v. United States Mineral Products Co.*, 898 A.2d 590 (Pa. 2006) ("*Mineral Products*"). There, a fire damaged an office building which used building materials containing polychlorinated biphenyls ("PCBs") manufactured by the defendant. The building housed the offices of several agencies of the Commonwealth of Pennsylvania. Following the fire, the Commonwealth made a decision to demolish the building because of the presence of PCBs, and it was replaced with a new building. The Commonwealth thereafter brought an action against several parties,

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[23] In *Davis*, the Court held that a manufacturer could be held strictly liable for subsequent changes that made its product unsafe if those changes were reasonably foreseeable.

including the manufacturer of the product containing the PCBs, seeking damages for negligence and strict products liability to recover the cost of constructing a new building as well as the loss of personal property contained in the old building. The case went to the jury "solely on a strict liability theory," and the jury returned a verdict against the manufacturer without specification of the particular theories/and or claims that were accepted. *Id.* at 594. The trial court's instruction had "explicitly or implicitly authorized [the jury] to evaluate the evidence to determine whether the fire could be considered to have been a reasonably foreseeable event against which the [manufacturer] should have guarded." *Id.* at 600.

On appeal, the Supreme Court held that the jury instruction was error because Pennsylvania does not recognize a strict products liability cause of action arising from an unintended use even when the unintended use is foreseeable. *Id.* (citing *Phillips*, 841 A.2d at 1007). Accordingly, a "foreseeable misuse of a product [i.e., the fire] will not support a strict liability claim." *Id.* (citing *Phillips*, at 1007). The Court acknowledged that it was "reasonably foreseeable that building materials may be subject to consumption in a fire, and therefore, [there was] an argument that safety . . . should be deemed to encompass . . . the event of . . . combustion." *Id.*, at 601. Notwithstanding the logic of that argument, the Court rejected it because it "contravenes the strong admonition in the lead opinion in *Phillips* . . . to the effect that foreseeability considerations have no place in the setting." *Id.*

For our purposes, it is important to note that in rejecting the trial court's "foreseeability charge," the Court observed: "given the conclusion of [the three concurring Justices in *Phillips*] that there are substantial deficiencies in present strict liability doctrine, it should be closely limited pending an overhaul by the Court." *Id.* (citing *Phillips*, 841 A.2d at 1018 (Saylor, J., concurring)).

In the portion of Justice Saylor's concurring opinion in *Phillips* that is cited in *Mineral Products*, Justice Saylor discussed the tension between "foreseeability" in negligence and strict products liability under Section 402A. He stated: "I BELIEVE, HOWEVER, that the . . . summation of Pennsylvania law demonstrates a *compelling* need for consideration of reasoned alternatives, such as are reflected in the position of the Third Restatement." 841 A.2d at 1018 (upper case in original, italics added). Justice Saylor went on to discuss the application of the Restatement (Third) of Torts at some length. *See id.* at 1019-22.

We believe that Justice Saylor's concurring opinion in *Phillips* foreshadows the Pennsylvania Supreme Court's adoption of §§ 1 and 2 of the Third Restatement's definition of a cause of action for strict products liability.

The Restatement (Third) of Torts provides in relevant part as follows:

> § 1. Liability Of Commercial Seller or Distributor For Harm Caused By Defective Products

> One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.[24]

Restatement (Third) of Torts: Products Liability, § 1.

Section 2 provides, in relevant part:

§ 2. Categories Of Product Defect

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other

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[24] Under Section 1, "[o]ne engaged in the business of selling or otherwise distributing" applies to "manufacturers." Restatement (Third) of Torts: Products Liability, § 1, cmt. c.

> distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Restatement (Third) of Torts: Products Liability, § 2.

As is readily apparent from this text, the Third Restatement does not limit a strict liability cause of action to the "user or consumer," and broadly permits any person harmed by a defective product to recover in strict liability. *See* Restatement (Third) of Torts: Products Liability, § 1; *see also* Am. L. Prod. Liab. 3d § 16:56 (2004) ("The drafters thus appear to be sanctioning claims by all foreseeable persons affected by a defective product, an interpretation as broad as that given to the Second Restatement by the courts . . . . The prevailing view *as to bystander recovery is that the theory of strict liability in tort may be applied to a mere bystander, as distinguished from a user or consumer.*") (emphasis added).

The change in the Restatement (Third) of Torts is consistent with the law in many states, including Wisconsin, California, Mississippi, Arizona, Missouri, Michigan, Iowa, Alabama, Utah, and Vermont.[25] These jurisdictions allow bystander

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[25] *See, e.g., Wasik v. Borg*, 423 F.2d 44, 47 (2d Cir. 1970) (Vermont would permit innocent bystanders to recover under § 402A.); *Beaver v. Howard Miller Clock Co., Inc.*, 852 F. Supp. 631, 635 (W.D. Mich. 1994) ("The Michigan Supreme Court has held that a manufacturer of a product owes a legal obligation of due care to a bystander affected by the use of its product."); *Rivers v. Great Dane Trailers, Inc.*, 816 F. Supp. 1525, 1531 (M.D. Ala. 1993) (noting Florida Supreme Court recognizes that "doctrine of strict liability applies when harm befalls a foreseeable bystander who comes within the range of danger."); *Lovelace v. Astra Trading Corp.*, 439 F. Supp. 753, 760 (S.D. Miss. 1977) (noting "the general consensus therefore appears to favor extension of the strict liability doctrine to provide relief to bystanders."); *Caruth v. Mariani*, 463 P.2d 83, 85 (Ariz. Ct. App. 1970) ("The doctrine of strict tort liability . . . should be available to bystanders as well as to the user or consumer . . . . All states which have adopted the theory of strict tort liability have extended the theory to the bystander when called upon to do so."); *Elmore v. American Motors Corp.*, 70 Cal.2d 578, 586 (Cal. 1969) (holding "doctrine [of strict liability] may not be limited on theory that no representation of safety is made to the bystander."); *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7, 16 (Iowa 1977) ("We now bear out the [8th Circuit] Court of Appeals' prediction and extend the doctrine of strict liability to the protection of bystanders."); *Howes v. Deere & Co.*, 201 N.W. 2d 825, 828 (Wis. 1972) (permitting recovery in strict liability for bystander injured by riding mower. "There is no essential difference between injured user or consumer and the injured bystander."); *Giberson v. Ford Motor Co.*, 504 S.W.2d 8, 12 (Mo. 1974) ("We extend any rights flowing from the rule of strict liability in tort . . . to include a bystander."); *Straub v. Fisher & Paykel Health Care*, 990 P.2d 384, 390 (Utah 1999) ("Manufacturers and sellers are strictly liable for the usual, foreseeable consequences of the risks presented by the defects in their products.")

liability using the very negligence concepts and foreseeability analysis that the majority opinion in *Phillips* rejected. *See, e.g., Elmore v. American Motors Corp.*, 451 P.2d 84, 89 (Cal. 1969) ("[i]njury to a bystander is often a perfectly foreseeable risk of the maker's enterprise . . . . If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable.").

The Third Restatement therefore eliminates much of the confusion that has resulted from attempting to quarantine negligence concepts and insulate them from strict liability claims. As Justice Saylor argues in the heading to Section III of his concurring opinion in *Phillips*: "The Restatement's considered approach illuminates the most viable route to providing essential clarification and remediation." 841 A.2d at 1019.

> [T]he [Third] Restatement's conception of defective design is more nuanced, to accommodate the wider range of scenarios that may face injured consumers and manufacturers/ suppliers. As a general rule, a product is deemed defective in design when the foreseeable risks could have been reduced or avoided by the use of a reasonable alternative design, and when the failure to utilize such a design has caused the product to be not "reasonably safe."

Id. (citing Restatement (Third) of Torts: Products Liability § 2(b)).

Justice Saylor criticized the *Phillips* majority's ritualistic approach to products liability as follows:

> the lead Justices retrench the Court's periodic admonishment to the effect that negligence concepts have no place in a strict liability action. A decided majority of courts and commentators, however, have come to recognize that this proposition cannot be justly sustained in theory in relation to strict products liability cases predicated on defective design; moreover, it is demonstrably incongruent with design-defect strict liability doctrine as it is currently implemented in Pennsylvania trial courts and in federal district courts applying Pennsylvania law. Furthermore, while the parties to the litigation underlying this appeal may not have expressly developed the approach of the products liability segment of the Third Restatement . . ., the Restatement position represents a synthesis of law derived from reasoned, mainstream, modern consensus. Particularly in view of pervasive ambiguities and inconsistencies in prevailing Pennsylvania jurisprudence in this area, I view this appeal as an opportunity to examine the range of readily accessible, corrective measures.

> In my judgment, the Restatement's considered approach illuminates the most viable route to providing essential clarification and remediation, at least on a prospective basis. Ultimately, I join the majority disposition on the strict liability and negligence claims under present law.

841 A.2d at 1012.

Our examination of appellate decisions in Pennsylvania that have discussed products liability convinces us that Justice Saylor was correct in recognizing that "[c]entral conceptions borrowed from negligence theory are embedded in strict products liability doctrine in Pennsylvania." *Id.* In fact, Justice Saylor went so far as to criticize the *Phillips'* majority's "adherence to the position that negligence concepts have no place in strict liability" as a "common aphorism in the developmental stages of strict liability doctrine . . . ." *Id.* at 1014-15. As noted earlier, the majority drew that distinction based upon its view that negligence focused on the conduct of the manufacturer whereas products liability focused on the product. However Justice Saylor pointed out: "most courts and commentators have come to realize that in design cases the character of the product and the conduct of the manufacturer are largely inseparable." *Id.* at 1015.[26]

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[26] Indeed, Justice Saylor recognized that it is the manufacturer who designs the product. It is therefore exceedingly difficult to ignore the manufacturer's conduct and focus only on the design that resulted from it.

Justice Saylor also noted that "the term 'defective' gives an illusion of certainty" because it suggests a specific meaning "rather than a term connoting a standard involving the weighing of factors." *Id.* at 1018 (citation omitted). We agree that it is difficult (if not impossible) in practice to determine if a product is safe for an intended use by an intended user without any consideration of foreseeability. *Id.* Accordingly, as Justice Saylor believed, "integration of the 'reasonably foreseeable use' alternative into strict products liability doctrine may reflect the greater consensus and better reasoned view, in the landscape of our law as it presently exists . . . ." *Id.*[27] The result achieved from

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[27] Despite the admonitions in *Phillips* and *Mineral Products* that liability under Section 402A is focused on intended users and intended uses and that negligence and foreseeability concepts have no place under strict products liability law, the decisions of the Pennsylvania Superior Court continue to struggle with the harsh consequences that the "intended user doctrine" can sometimes have. *See, e.g., Kiak v. Crown Equipment Corp.*, A.2d , 2009 WL 377166 (Pa. Super. Feb. 17, 2009) (employee/non-user of forklift injured by coworker operating the forklift permitted to proceed against manufacturer of forklift under Section 402A); *Schmidt v. Boardman Co.*, 958 A.2d 498 (Pa. Super. 2008) (bystanders who witnessed relatives killed and/or injured by defective product allowed to recover under Section 402A for emotional distress even though they suffered no physical injuries).

However, in *Bogush v. Allen Refractories Co.*, 932 A.2d 901, 910 (Pa. Super. 2007), the Superior Court refused to grant a new trial to a supplier of asbestos products based on the supplier's argument that that trial court erred in failing to apply the Restatement (Third) of Torts, § 2, instead of Section 402A, to plaintiff's strict liability claim. The supplier argued that it was entitled to a new trial because a miscarriage of justice had occurred when the trial court applied Section 402A rather than the reasoning of Justice Saylor's concurrence in *Phillips*. *Id.* The Superior Court refused to adopt the reasoning

the approach of the Third Restatement is consistent with the modern trend of law as well as the evolving policy considerations discussed in *Webb* that lead to the adoption of the Section 402A in the first place.

Justice Saylor authored the Court's majority opinion in *Mineral Products*. There, he was joined by now Chief Justice Castille, and Justices Nigro and Eakin, as well as then Chief Justice Cappy. Justice Newman wrote a concurring and dissenting opinion that was joined by Justice Baer. In Section II of his majority opinion, Justice Saylor discussed the plaintiff's strict liability claim. He noted that, although "it is reasonably foreseeable that building materials may be [consumed] by fire," and therefore building materials that cause damage when burned could be deemed defective, that "argument contravenes the strong admonition in the lead opinion in *Phillips*. . . to the effect that foreseeability considerations have no place in [strict liability]." 898 A.2d at 601.

Justice Newman dissented from Justice Saylor's discussion of strict liability in *Mineral Products*. Joined by Justice Baer, Justice Newman stressed that *Phillips* should not have governed the

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of the concurrence in *Phillips*, stating that "[u]nless and until our Supreme Court alters its approach to strict liability, we will continue to adhere to established principles." *Id.*

The supplier filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which granted the petition on February 27, 2008. *Bugosh v. I.U. North America, Inc.*, 942 A.2d 897 (Pa. 2008) (per curiam). The Pennsylvania Supreme Court framed the issue as follows: "Whether this Court should apply § 2 of the Restatement (Third) of Torts in place of § 402A of the Restatement (Second) of Torts."

analysis in *Mineral Products* because "there was no Majority [in *Phillips*] to conclude that foreseeability considerations **never** have a place in a strict liability case. Instead, the overriding principle set forth in *Phillips* is that strict liability should be limited to a very small range of cases . . . [and] cases involving an unintended user [i.e., *Phillips*] are outside the scope of the strict liability doctrine." *Id.* at 615. (emphasis in original). She further explained:

> As in *Phillips*, an argument concerning the Third Restatement of Torts is not before us. I recognize the apparent and possible appeal in the more progressive approach adopted by the Third Restatement, in particular, in cases such as this involving a known dangerous chemical where a risk-utility test would be a just measure of a manufacturer's liability for the product. However, I will proceed to analyze the present matter pursuant to our existing caselaw and the Second Restatement of Torts.

Id. at 616 n. 2.

Thus, it is clear from the discussions of Justice Saylor in *Phillips* and Justice Newman in *Mineral Products* that there is substantial support on the Court to adopt the Third Restatement's approach to product liability in an appropriate case.[28] We believe that this is such a case.

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[28] *Phillips* was decided by six Justices. We view the relevant portion of the opinion as a two-justice majority

The unintended user doctrine is not implicated by Berrier's claim. Accordingly, there is little logic and much sophistry in reflexively applying cases discussing intended uses and users to determine liability for defective design under the circumstances here. *See Aetna Life & Cas. Co. v. Barthelemy* 33 F.3d 189, 193 (3d Cir. 1994) ("Where stops the reason, there stops the rule.").

District courts in Pennsylvania have no doubt recognized that lack of logic and abundance of sophistry because they have allowed bystanders to recover in strict products liability under Section 402A under Pennsylvania law just as Justice Saylor explained in *Phillips*.[29] Even though those cases

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because then Chief Justice Cappy authored the decision, but only Justice Newman expressly joined the portion of the opinion which held that the strict liability claim must fail because the lighter was not unsafe when used by adults, and that concepts of negligence have no place in strict products liability cases. *Phillips*, 841 A.2d at 1023. Justice Saylor filed a concurring opinion joined by Justices Castille and Eakin. *Id.* at 1012 (Saylor, J., concurring). Justice Newman filed a concurring and dissenting opinion which expressed her support of Chief Justice Cappy's opinion, as well as her disagreement that the negligence causes of action should be permitted to go forward. *Id.* at 1023 (Newman, J., concurring and dissenting). Justice Nigro concurred in the result, but did not write separately or join either concurrence. *See id.* at 1012. Justice Zappala did not participate in the decision. *Id.* at 1011.

Although Justice Newman is no longer on the Pennsylvania Supreme Court, Justice Baer remains. The fact that he joined Justice Newman's opinion means that four of the current seven Justices have voiced support for adopting the Third Restatement.

[29] *See, e.g., Fedorchick v. Massey-Ferguson, Inc.*, 138 F. Supp. 60, 62-63 (E.D. Pa. 1997), *aff'd*, 577 F.2d 725 (3d Cir.

were decided before *Phillips* and *Mineral Products*, we do not believe that the result in those cases is altered by the Court's subsequent decisions because, as Justice Newman explained in *Mineral Products*, *Phillips* is a narrow holding that only addresses "unintended users," and *Mineral Products* did not involve bystanders at all.

Moreover, we implicitly recognized the right of bystanders to recover in strict products liability under Pennsylvania law in *Parks v. AlliedSignal, Inc.*, 113 F.3d 1327 (3d Cir. 1997), and *Surace v. Caterpillar, Inc.*, 111 F.3d 1039 (3d Cir. 1997). We decided those cases within two months of each other, but before the Pennsylvania Supreme Court's decisions in *Phillips* and *Mineral Products*. *Parks* and *Surace* nevertheless demonstrate the difficulties of employing a rigid bar to preclude bystander recovery under Section 402A.

1978) (Table) ("[Section] 402A provides coverage for a person who suffers harm proximately caused by a defective and unreasonably dangerous product, regardless of whether that person used or consumed the product."); *see also Stratos v. Suer Sagless Corp.*, 1994 WL 709375 at *5 (E.D. Pa. December 21, 1994) (permitting administrator of seventeen month old daughter's estate to bring strict liability claim against manufacturer of allegedly defective bed even though the decedent was "non-user of the product who wandered into the product's danger zone"); *Herman v. Welland Chemical, Ltd.*, 580 F. Supp. 823, 829 (M.D. Pa. 1984) (volunteer fireman struck by car while directing traffic following chemical spill on highway permitted to bring Section 402A claim). *But see Van Buskirk v. West Bend Co.*, 100 F. Supp.2d 281, 285 (E.D. Pa. 1999) (guardians of child burned by an allegedly defective fryer denied recovery on a strict liability theory, in part, because the child was "not an intended user" of the fryer).

In *Parks*, the manufacturer of an excavating machine was sued by the spouse of an employee who was killed when he was struck by a counterweight attached to the machine's excavating arm. The spouse claimed that the design of the machine was defective because it did not provide sufficient visibility for the operator to see her husband. The jury returned a verdict in favor of the manufacturer, and plaintiff appealed arguing, *inter alia*, that the district court had erred in instructing the jury about contributory negligence and causation. The jury had concluded that the design of the machine was defective but "presumably" based its verdict on a finding that "the defect was not 'a substantial factor' causing the death." 113 F.3d at 1330.[30]

We reversed because the jury charge did not explain that the decedent's own conduct could only have been the "'legal cause of the accident' if [that conduct] was . . . extraordinary or unforeseeable." 113 F.3d at 1337. We reached that conclusion based on "[t]he centrality of foreseeability to Pennsylvania's strict products liability law. . . ." *Id.*

Thus, as we said in *Parks*, the "manufacturer [was] . . . responsible for making the product safe for all foreseeable uses." 113 F.3d at 1332.

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30 The argument was actually phrased in terms of causation. Appellant argued that the court should have instructed the jury that "if [her husband's] conduct were foreseeable, such conduct could not have broken any chain of causation linking the alleged defect to his death." 113 F.3d at 1330.

The facts in *Surace v. Caterpillar, Inc.*, 111 F.3d 1039 (3d Cir. 1997), are very similar to the facts before us here. There, a construction worker was injured when his foot was run over by paving equipment. He brought an action for damages under Section 402A, alleging that the machine's design was defective because it did not prevent the machine from operating in reverse unless activated by someone on the ground. The district court granted summary judgment to the manufacturer.

On appeal, we held that the district court erred by not first performing a risk utility analysis as required by *Azzarello*, and we suggested that the "multi-factor list developed by Dean John Wade [could] be employed in doing so." 111 F.3d at 1042 (citing John Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss.L.J. 825, 837-38 (1973)).[31] As we suggested earlier, our remand to allow the trial court to conduct a risk utility analysis implicitly recognized the right of the plaintiff/bystander to recover under Section 402A.

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[31] The "Wade factors" for conducting a risk utility analysis are:

(1) The usefulness and desirability of the product . . . to the user and to the public as a whole; (2) The . . . likelihood that it will cause injury, and the probable seriousness of the injury; (3) The availability of a substitute product which would meet the same need and . . . be [safe]; (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive . . . ; (5) The user's ability to avoid danger by the exercise of care . . . ; (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability. . . ; and (7) The feasibility, on the part of the manufacturer, of spreading the loss [or] setting the price of the product or carrying liability insurance. 111 F.3d at 1046 (citations omitted).

We did so while stressing that "the Pennsylvania Supreme Court eschews the use of negligence concepts in a strict liability case." 111 F.3d at 1050 (citing *Lewis v. Coffing Hoist Div., Duff-Norton Co.*, 528 A.2d 590, 593 (Pa. 1987) and *Kimco Dev. Corp. v. Michael D's Carpet*, 637 A.2d 603, 606 (Pa. 1993)).

Our discussion in *Surace* included an example suggested by Dean Wade:

> [T]he dangers of a hoe or an axe are both matters of common knowledge and fully apparent to the user. But it is not necessarily sufficient to render a product duly safe that its dangers are obvious, especially if the dangerous condition could have been eliminated. A rotary lawn mower, for example, which had no housing to protect a user from the whirling blade[,] would not be treated as duly safe, despite the obvious character of the danger.

111 F.3d at 1052 (quoting Wade, *supra* at 842-43) (brackets in original).

We agree and we do not think anything that the Court has since held is to the contrary. Nor do we think the policy behind strict products liability is served by declaring that the design of Dean Wade's hypothetical mower is only defective if the spinning blade injures the user. Yet, that is the result of artificially restricting strict products liability to "intended users" based upon concerns of contaminating a strict liability claim with

considerations of foreseeability. We believe that the same policy demands that were first articulated in *Webb* require placing the risk of loss on the manufacturer whether the person injured by Dean Wade's hypothetical mower is operating the mower or standing near it.

Similarly, we find nothing in Pennsylvania law to suggest that the Supreme Court would deny recovery under a strict liability theory to spectators at a sporting event who are injured by an airplane that crashes into the stadium because a wing was defectively designed. We do not think the policy considerations that have been recognized since *Webb* would allow strict liability claims to the passengers but deny it to the spectators simply because they happened to be underneath the falling debris and not inside of it. Sections 1 and 2 of the Third Restatement avoid such illogical results.[32] Section 2 of the Third Restatement takes a "more progressive view," and far more realistic approach to strict liability when "bystanders" are involved.

We therefore conclude, as Justice Saylor proclaimed in *Phillips*, that "the time has come for this Court . . . to expressly recognize the essential

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[32] Yet another hypothetical further illustrates the point. If a car manufacturer's design resulted in a car with a passenger compartment impervious to the force of any impact, but which caused the wheels to fly off when the car approached 20 mph, pedestrians struck by the wheel should certainly be able to argue that the design was defective (and not merely negligent). It is incomprehensible to us that the policy considerations underlying products liability law in Pennsylvania would preclude such a suit merely because the pedestrian/plaintiff was a "bystander" and not an occupant/user of the car.

role of risk-utility balancing, a concept derived from negligence doctrine, in design defect litigation." 841 A.2d at 1015-16 (Saylor, J., concurring). Justice Saylor has recognized that "[the] Commonwealth's products liability litigation jurisprudence is far too confusing for another opinion to be laid down that rhetorically eschews negligence concepts in the strict liability arena, while the Court nevertheless continues to abide and/or endorse their actual use in the liability assessment." *Id.* at 1016.

This case would allow the Supreme Court an opportunity to acknowledge that the Third Restatement "represents a synthesis of law derived from reasoned, mainstream, modern consensus." *Id.* at 1012 (Saylor, J. concurring). We believe that, if addressing this issue, a majority of the Supreme Court would agree that "the [Third] Restatement's considered approach illuminates the most viable route to providing essential clarification and remediation, at least on a prospective basis." *Id.*

We realize that Justice Saylor's comments focused on Section 2(b) of the Third Restatement of Torts, and that section only addresses *when* a product is defectively designed. *Id.* at 1019-1021 As we explained earlier, the issue here involves *who* the manufacturer is liable to because of a defectively designed product. That question is addressed in section 1 of the Third Restatement, not section 2.

The concurring opinion in *Phillips* did not discuss Section 1. However, Justice Saylor did recognize that Section 2(b), the section describing when a product is defective, is "generally a

negligence standard," *id.* at 1020, and he ostensibly recognized that integrating negligence principles into a strict liability design defect claim, including the replacement of the intended user doctrine with a "reasonably foreseeable use" standard, "may reflect the greater consensus and better reasoned view." *Id.* at 1018. We think it highly likely that the Justices who would adopt section 2 would adopt as well as section 1 rather than trying to parse the applicable provisions of the Third Restatement and thereby supplant some of the provisions of the Second Restatement and not others.[33]

We therefore hold that the district court should not have relied on the "intended user" doctrine in granting summary judgment to Simplicity on the Berriers' claim for strict products liability based on the allegedly defective design of Simplicity's lawn mower. We will therefore vacate on that claim and remand for proceedings consistent with this opinion.[34]

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[33] On January 17, 2008, pursuant to Third Circuit LAR MISC. 110 and Internal Operating Procedure 10.9, this panel certified the following question to the Pennsylvania Supreme Court:

> Whether, under Pennsylvania law a plaintiff minor child may pursue a strict liability claim for injuries caused by a riding lawnmower, where the child is neither an intended user nor consumer of the mower.

However, on October 17, 2008, the Pennsylvania Supreme Court entered an order respectfully declining the panel's petition for certification.

[34] As noted in the concurrence in *Phillips*, Section 2(b) of the Third Restatement "roundly endorses a reasonableness-based, risk-utility balancing test as the standard for adjudging

B. Negligence.

The district court also held that the Berriers' negligent design claim failed as a matter of law because "Simplicity did not owe a duty to Ashley to design the mower in accordance with plaintiffs' proposed safety features." 413 F. Supp.2d at 444. The court also rejected the claim because the Berriers did not present any evidence "to indicate that the design of the instant mower with additional so-called 'safety' features would actually increase the safety of the mower without impairing its social utility." *Id.* at 449. The Berriers claim that both rulings were erroneous.

To prevail in a negligence action, a plaintiff "must show that the defendant had a duty to conform to a certain standard of conduct, that the defendant breached that duty, that such breach caused the injury in question, and actual loss or damage." *Phillips*, 841 A.2d at 1008 (citation and quotation marks omitted). Whether a defendant owes a duty of care to a plaintiff is a question of law in Pennsylvania. *Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1366 (3d Cir. 1993).

We agree with the Berriers that the court erred in ruling that Simplicity did not owe a duty to Ashley. In resolving that question at the summary judgment stage, the court should have viewed the record in the light most favorable to the Berriers - the non-moving parties. *See Andreoli v. Gates*, 482

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the defectiveness of product designs." 841 A.2d at 1020 (Saylor, J., concurring) (citation omitted).

F.3d 641, 647 (3d Cir. 2007); *see also* Fed.R.Civ.P. 56(c).

In Pennsylvania, the determination of whether a duty of care is owed is a policy decision that requires the trial court to apply the "*Althaus* test." That inquiry requires that the court consider: "(1) the relationship between the parties; (2) the social utility of the [defendant's] conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the [defendant]; and (5) the overall public interest in the proposed solution." *Phillips*, 841 A.2d at 1008 (quoting *Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000) (quotation marks omitted)).[35]

Although these factors guide the court's inquiry "[i]n determining the existence of a duty of care, it must be remembered that the concept of duty amounts to no more than the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection from the harm suffered." *Althaus*, 756 A.2d at 1168-69 (citation and internal quotation omitted). "Thus, the legal concept of duty of care is necessarily rooted in often amorphous public policy considerations, which may include our perception of history, morals, justice and society." *Id.* at 1169. Because the question of whether a defendant owes a plaintiff a duty of care is a question of law, *Kleinknecht v. Gettysburg College*, 989 F.2d at 1366, we have plenary review of the district court's determination that Simplicity did not owe Ashley a duty of care. *See American Society for*

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[35] This inquiry is very similar to the inquiry suggested by the "Wade factors." *See* n.31, *supra*.

Testing & Materials v. Corrpro Companies, Inc., 478 F.3d 557, 566 (3d Cir. 2007) ("[w]e have plenary review over a district court's conclusions of law") (citation omitted). 1. Relationship Between the Parties

We believe that the relationship between Ashley and Simplicity is, at best, uncertain because Ashley did not purchase the mower. It must be remembered that the relationship between the parties in *Phillips* weighed against a duty. Although there was a relationship there between the mother/purchaser and the manufacturers, the relationship between the defendant lighter manufacturers and the children who died in the fire was "less certain." *Phillips*, 841 A.2d at 1009. We therefore agree with the district court that this factor weighs against the existence of an underlying duty to Ashley. However, it must also be remembered that "[n]o one of these five factors is dispositive. Rather, [a duty] will be found to exist where the balance of these factors weighs in favor of placing such a burden on a defendant." *Id.* at 1008-09. We believe each of the remaining factors weighs in favor of finding that Simplicity owed Ashley a duty of care.

2. Social Utility of Defendant's Conduct

The district court's analysis of the social utility of the mower included the following three findings: (1) a riding mower that cannot mow in reverse lacks social utility, (2) Plaintiffs failed to present evidence indicating that an NMIR device that shuts down the mower if an operator engages

the mower blades while operating in reverse would increase the product's safety; and (3) the additional safety mechanisms identified by Plaintiffs, including roller barriers and an NMIR device with an override feature, do not actually improve safety by decreasing back-over injuries. 413 F. Supp.2d at 444-46. However, those findings are inconsistent with the record.

The district court reasoned that "operators frequently need to cut grass in reverse. To deny operators the capacity to perform these basic maneuvers, with the mower deck engaged, would add significant time and frustration to the lawn-mowing task." *Berrier*, 413 F. Supp. at 444. That conclusion overlooks testimony by the defendant's own expert who testified that "there is *rarely* any reason to mow in reverse." App. 758. That expert explained that:

> nearly all of the reverse operations on these machines are just for maneuvering. I have seen situations where it's -- would be easy to understand why somebody would want to mow in reverse when they have a very narrow corridor and there is no room to turn around at the end and two cutting widths will cut that grass. But those kind of geometric situations are kind of unusual.[36]

App. 758.

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[36] Similarly, Ashley's grandfather put the mower in reverse in order to turn the mower around. He was not attempting to mow in reverse. App. 126.

The court's consideration of this factor also overlooks the undisputed fact that, between 1982 and 1992, five leading riding mower manufacturers sold nearly two million units which prevented the operator from mowing in reverse by incorporating the MTD device. App. 557-58.

Second, the Berriers proffered sufficient evidence to establish that the mower in question was safer when equipped with the NMIR device. Their expert reported that, out of the two million mower units just mentioned, none generated any reports of a back-over blade accident. App. 558.

It is important to clarify that two NMIR devices are relevant to our inquiry: the MTD Device"— used by MTD in two million of its mowers when Shoff's mower was manufactured, and the "Override Device." We consider the social utility of each in turn.

a. NMIR

The district court concluded that the MTD device lacked social utility because it shuts down the mower's engine when operated in reverse, but allows the mower to backup for at least 4.5 feet before the engine shuts off. 413 F. Supp. 2d at 444. This blade interlock device is the device that the CPSC refused to require as an industry standard because of efficacy concerns. App. 391. The CPSC found that such a device would likely be disabled by the operator out of frustration. *Id.* at 473. Moreover, the group stated it did not have sufficient data on how many deaths or injuries would be prevented by a

NMIR feature because there was no data on how fast the blade would have to stop to significantly reduce injuries, or the extent to which children would be injured by being backed over after the blade stopped. App. 472.

The district court was also unpersuaded by the Berriers' evidence of the lack of injuries caused by suitably equipped MTD mowers. It cited evidence of four back-over accidents involving MTD mowers—which appears to contradict the Berriers' evidence that the MTD device completely eliminated all back-over accidents. 413 F. Supp.2d at 445.

The Berriers point out, however, that all of these incidents occurred when the operator disabled the NMIR device.[37] App. 761-63. Berriers' counsel informed the court of Simplicity's admission of this fact during oral argument. The trial court was apparently not persuaded. However, we believe that is a relevant consideration, particularly because this is consistent with the statement made by Gunter Plamper, MTD's Vice President for Product Development and Safety. He testified about the effectiveness of the device as follows:

> The no-mow-in-reverse feature will shut off mower blades if an operator shifts into reverse without first disengaging the mower blades. This safety feature has successfully

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[37] This fact is disputed. Berrier claims that all four incidents occurred when the NMIR was disabled. Simplicity maintains that only two of the four incidents involved disabled NMIR devices. *See* Simplicity's Br. at 45-46.

> prevented back-over accidents. Neither MTD, Cub Cadet, Yard-Man, White Out Door or MTD Yard Machines have had any reported back-over accidents on one of their riding mowers when the safety features were *in place and functioning* as designed.

App. 581 (emphasis added).

The district court believed the fact that the device could be disabled negated any safety advantage of the design.[38] 413 F. Supp.2d at 445. The court relied in part on a study from the 1980's that confirmed that at least 40 percent of operators disabled NMIR features on their mowers. 413 F. Supp. at 445 n.8. However, that statistic also means that the majority (60%) of people operating these mowers did not disable the feature. Accordingly, we believe that the record establishes that the feature could have a significant impact on reducing the risk of injury from back-over accidents.[39] The

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[38] This conclusion is in tension with the current industry practice of including back-over protection on riding mowers. If the protection was ineffective, and lacked any social utility, as the district court concluded, it is difficult to understand why other companies would incorporate this feature. Manufactures that added NMIR devices (though it is not clear what kind–override or the MTD original) included Toro in 1999, John Deere, Snapper and Kubota. App. 314. The only logical reason for including an NMIR device on a riding mower was stated by the CPSC: mowers that contain an NMIR device are safer than those without one. App. 576.

[39] The district court was also troubled by the fact that the Berriers' expert had not personally conducted studies on the rate at which NMIR systems are disabled. More importantly,

determination of whether a product was negligently designed turns on whether "an alternative, *feasible*, safer design would have lessened or eliminated the injury plaintiff suffered." *Habecker v. Clark Equipment Co.*, 36 F.3d 278, 281 (3d Cir. 1994) (quotations marks and citation omitted) (emphasis in original). The Berriers presented evidence that the NMIR device without the override would have at least lessened the likelihood of Ashley's injury and may have eliminated it.

b. Override Device

The district court dismissed the efficacy of an override device because it viewed such a device as equivalent to a design which allowed the operator to choose whether to engage the blades or not ("mow in reverse"). 413 F. Supp. 2d at 446. However, the difference is significant because an override switch requires an extra step before being able to mow in reverse. In theory, the operator can not backup without thinking; the default position disengages the blades when the mower is put into reverse. *See* App. 580. On those rare occasions when it is necessary to mow while backing up, the extra step reminds the operator to check behind the mower before pressing the override button. We realize that the Berriers'

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the expert had not conducted any statistical analysis to determine the rate of back-over blade injuries between mowers with NMIR features and those without such features; or the rate of back-over blade injuries for mowers with a disabled NMIR feature. 413 F. Supp.2d at 445. However, at the summary judgment stage, the court is not entitled to weigh the evidence; that is solely the task of the fact-finder. Rather, the court must limit its inquiry to whether a genuine issue of fact exists.

expert did not provide any data to show mowers with this design had fewer back-over injuries. However, ANSI's adoption of the requirement in 2003 certainly suggests that mowers with this design are safer.

The district court was ultimately unconvinced by Berrier's argument. 413 F. Supp. 2d at 446 ("[T]his Court fails to see how a "no mow in reverse device" with an override would prevent future back-over accidents . . . .").[40] However, the very fact that the ANSI standard has required NMIR devices on riding mowers since 2003 undermines the district court's conclusion that NMIR devices do not increase safety. That is particularly true since the court relied so heavily on the CPSC's initial refusal to require the MTD device (with no override feature).

Moreover, though the CPSC did not promulgate regulations requiring NMIR devices when Shoff's mower was manufactured, the CPSC did acknowledge that riding mowers with an NMIR feature are safer than those without one. App. 576. That, together with the Commission's later adoption of the device with an override feature (presumably, that device addressed the Commission's earlier concerns) supports the Berriers' argument that an alternative design could have prevented Ashley's injury and that Simplicity therefore had a duty to adopt it. We therefore believe that the district court's conclusion that an NMIR with an override feature was not a feasible and safer design is directly

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[40] The Berriers characterize the trial court's determination that the safety devices they proposed were ineffective (and presumably could not have prevented this accident) as a judicial determination of "no causation."

contradicted by the industry's decision to promulgate standards requiring such devices and the subsequent compliance with this requirement.

c. Roller Devices

The district court committed a similar error in concluding that there was no genuine issue of material fact about whether roller barriers "would actually improve safety by decreasing back-over injuries." 413 F. Supp.2d at 446. In reaching that conclusion, the court appears to have ignored evidence that Simplicity believed so strongly in the effectiveness of roller barriers that the company requested that feature be considered as an acceptable alternative to the NMIR device requirements in the ANSI 2003 standards. App. 597-98. Moreover, Simplicity admitted that "rollers may provide some protection against accidents and injuries" in its responses to interrogatories. App. 151.

In reaching its conclusion to the contrary, the district court focused on the Berriers' expert's refusal to testify that the use of roller guards would make the mower "reasonably safe" in part because he lacked information "on the performance of rollers in preventing child back-over blade contact accidents." 413 F. Supp. 2d at 446. However, when discussing Ashley's specific injury, E. Reed Smith, P.E., the Berriers' expert, confirmed in his report that rollers are effective in pushing small children backwards and out of the way of the spinning blades. App. 553-54. There is also evidence of a 1997 study by Reed confirming the effectiveness of the roller barrier.

App. 519, 593-94. Reed's report also further stated that if the subject mower had a set of "full-width ground-contacting rollers at the rear edge of the mower deck, given the distance Mr. Shoff backed up on the day of the accident, it is unlikely Ashley would have suffered the amputation injury she did." Reed therefore concluded that the lack of rollers "was a cause of Ashley Berrier's foot amputation injuries." App. 560.

As previously noted, Simplicity makes much of the fact that Reed testified that roller blades alone would not make the mower reasonably safe. However, that is a legal conclusion. Moreover, it misstates the applicable legal standard. That standard is whether the design "would have lessened or eliminated the injury plaintiff suffered." *Habecker*, 36 F.3d at 281 (citation and quotation marks omitted). Reed testified that "rollers in this particular situation would have prevented this accident." App. 302.

The district court also appears to have ignored statements of Simplicity's own lead designer, who stated: "we think that the potential for a full roller to offer some protection in some circumstances for – that certainly doesn't hurt the – the propensity for blade contact and it may offer some protection." App. 518. Another Simplicity engineer testified that the roller barrier provided back-over protection and reduced injuries. App. 593-96. Furthermore, as previously noted, Simplicity was so confident about the effectiveness of the roller barrier that it asked the OPEI to consider the roller barrier on Simplicity products as "an acceptable barrier" in lieu of an

NMIR device in the 2003 ANSI standard, which now requires back-over protection. App. 597-98.

Accordingly, after viewing the evidence in the light most favorable to the Berriers, we believe that the district court erred in concluding that the social utility factor weighed against finding that Simplicity owed a duty to the Plaintiffs.

3. Nature of the Risk and Foreseeability of Harm

The third prong of the duty inquiry balances social utility of a design against the extent and foreseeability of the harm that would result in its absence. *Althaus*, 756 A.2d at 1170. "A duty arises only when one engages in conduct which foreseeably creates an unreasonable risk of harm to others." *R. W. v. Manzek*, 888 A.2d 740, 747 (Pa. 2005).

Here, the Berriers produced evidence that the risk of back-over blade contact injuries exists and that this risk was foreseeable when Shoff's mower was manufactured; and the district court conceded as much. *Berrier*, 413 F. Supp. at 447. The Berriers' expert testified that, based on studies published between 1981 and 1993, one riding mower per 5,000 to 6,000 produced is involved in a back-over blade accident at some point. *Id.* However, the district court concluded that this weighed only marginally in favor of finding a duty of care because the CPSC had not found the risk of injury sufficiently significant to promulgate a final regulation mandating or recommending the addition of NMIR devices. *Id.*

The Berriers correctly point out that the district court focused on CPSC's decision not to promulgate regulations. However, as both parties acknowledge, that decision was based on the efficacy of mowers with NMIR devices. It was not based on the nature of the risk and foreseeability of harm. The CPSC and others realized that risk after a series of studies in the 1970's and 80's. App. 544-50. Those studies characterized back-over blade accidents as the most tragic type of lawnmower accidents, comprising between nine and 11 percent of reported accidents involving riding mowers. App. 721. The Berriers' expert testified that more than 100 hospitalizations per year take place because of back-over blade contact incidents. App. 735. Moreover, as Ashley's tragic injury demonstrates, the injuries that do result can be quite serious. Indeed, the injuries are potentially fatal in the absence of prompt medical attention and expert treatment that may not be available everywhere riding mowers are used.

The district court acknowledged the raw data in these studies but concluded that CPSC's hesitation in promulgating NMIR requirements (despite its awareness of the studies) undermined the significance of those statistics. In doing so, the court cited the CSPC's statement that it lacked "sufficient information to determine how many deaths or injuries would be prevented by [a no-mow-in-reverse] feature." 413 F. Supp.2d at 447 (quoting CPSC Letter dated July 19, 1993 (App. 472)) (internal quotation marks omitted).

However, CSPC's decision was not based on the low risk of accident. Rather, the CSPC did not

act because standards were already "being actively pursued by the industry," and the CSPC concluded that "there is usually a high degree of conformance to this type of voluntary standard." App. 577.

Simplicity maintains that CPSC's decision not to require anti-back-over devices is consistent with the statistical infrequency of back-over accidents when Simplicity manufactured Shoff's mower. Simplicity claims its position is further strengthened by the fact that Simplicity was aware of just two back-over accidents since 1983 with the model that Shoff purchased. App. 72. We agree that such accidents were infrequent. In fact, the Berriers themselves cite the CPSC letter to the OPEI acknowledging "accidents are infrequent." However, the serious nature of the injuries that do result must be factored into the equation along with the frequency of occurrence. Accordingly, we believe the district court did not give adequate weight to the fact that the letter concerning adding an NMIR feature to any revised ANSI standard stated: "the population at risk and the severe mental trauma to the child's family fully support the need to take immediate steps." App. 548-49.

We therefore conclude that the district court failed to assign adequate weight to this factor in favor of Berriers under the summary judgment standard.

4. Consequences of Imposing a Duty

The district court acknowledged that the average cost of $9.00 per mower of incorporating a

NMIR device was minimal. 413 F. Supp. 2d at 448. It certainly is. The court nevertheless weighed this factor against the Berriers because they "failed to propose a feasible design alternative that would reduce the likelihood of back-over blade accidents while maintaining the social utility of the product." *Id.* at 448. Thus, in the court's view, imposing such a duty would be "superfluous." *Id.*

However, for reasons we have already explained, we believe that the Berriers did offer evidence of alternative designs. The Berriers' evidence of effective alternative designs included: (1) the experience of other manufacturers with NMIR devices, particularly the MTD experience; (2) the recent OPEI/ANSI standard requiring NMIR protection; and (3) evidence that Simplicity itself advocated roller barriers because they provide effective back-over protection. Other Simplicity models had the barrier, and Simplicity's former Vice President of Engineering from 1983 to 1999 testified that the roller blade offers some protection. App. 518.

Given the minimal cost of adding an alternative design, and the potentially monumental financial and human cost of not doing so, this factor clearly weighs heavily in favor of a duty.

5. Public Interest

The court concluded that the public interest weighed against the existence of a duty to alter Simplicity's design based on its belief that there was no genuine issue of material fact as to the

effectiveness "of the proposed features, from rollers to an NMIR device with override," as well as the devalued social utility of a mower with such a device and the resulting burden on Simplicity of becoming the insurer of its products. 413 F. Supp. 2d at 448.

In reaching that conclusion, the court improperly conflated a cost/benefit analysis with its consideration of the public interest, as well as an analysis of the consequences of imposing the duty on Simplicity. For example, the court reasoned that imposing the duty would not only "devalue the *social utility* of the mower, preventing its ability to cut grass in a time-effective and efficient manner, but also would *transform Simplicity into an insurer* of its products in violation of Pennsylvania law." 413 F. Supp. 2d at 448 (citing *Azzarello*, 391 A.2d at 1024) (emphasis added). The court thereby incorporated its erroneous balancing of the second and fourth factors of the *Althaus* test and added the weight of those factors to the fifth factor.

Unlike the district court's analysis, the Pennsylvania Supreme Court's analysis of the public interest in *Phillips* did not consider cost/benefit or the consequences to the manufacturer. Instead, the Court simply concluded that

> [t]here is a strong public interest in minimizing fires started as a result of children playing with butane lighters. Such fires have catastrophic effects on human beings as well as property. Avoidance of them would be an unquestionable boon to society. Thus,

> this factor weighs in favor of finding a duty.

841 A.2d at 1010.

Nevertheless, Simplicity claims that the public interest is not advanced by imposing an additional duty on the manufacturer and thereby supplanting the obligation of parental supervision. According to Simplicity, the NMIR device has an unproven ability to reduce a risk and, if required, would increase the risk to the operator, while decreasing product utility. Simplicity does not, however, explain how the risk increases for the operator, nor does it explain why such devices became the industry standard after 2003 if it decreased the mower's utility and increased the risk to the operator.

The Berriers maintain that this is precisely the kind of situation where the public interest is served by imposing a duty of care. The marginal costs of designing a product with an NMIR feature are coupled with the benefit of reducing severe physical injury to children. We agree.

6. The End Result of the Balancing.

Thus, viewed in the light most favorable to the nonmoving party, we believe that four out of five of the *Althaus* factors weigh in favor of finding that Simplicity owed Ashley a duty to incorporate some kind of back-over device on Shoff's mower.

We also believe that there is sufficient evidence to create a genuine issue of material fact as to whether an alternative design would have prevented Ashley's injuries. Therefore, we will vacate the district court's order granting Simplicity's motion for summary judgment on the negligence claim and remand for further proceedings.

IV. CONCLUSION

Because we have predicted that the Pennsylvania Supreme Court would adopt the Restatement (Third) of Torts, §§ 1 and 2, we hold that summary judgment should not have been granted to Simplicity on the Berriers' claim of strict products liability. Thus, we will vacate the district court's order granting summary judgment to Simplicity on that claim. Moreover, for the reasons we have explained, we will also vacate the grant of summary judgment to Simplicity on the Berriers' negligence claim. We will remand both claims to the district court for further proceedings consistent with this opinion.

[FILED: June 29, 2005]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WAYNE BERRIER, et al.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
SIMPLICITY CORPORATION	:	**NO. 04-CY-97 LDD**

MEMORANDUM OPINION

J. Davis June 29th, 2005

Wayne Berrier and Brenda Gregg ("plaintiffs"), on behalf of Ashley Berrier ("Ashley), a minor, assert negligence and strict liability claims for damages against the defendant/third-party plaintiff, Simplicity Manufacturing, Inc. "Simplicity"), for injuries Ashley received by virtue of an allegedly defective riding lawn mower (the "mower") manufactured by Simplicity. At the time of the accident, the mower was being operated by Melvin Shoff ("Mr. Shoff"), Ashley's grandfather. Simplicity has asserted a contribution claim against Mr. Shoff and his wife, Mrs. Shoff (collectively referred to as "third-party defendants"), alleging among other theories of negligence that they failed to supervise Ashley.

Presently before the Court is Simplicity's motion for summary judgment on plaintiff negligent design and strict product liability claims (Doc. No. 33); plaintiffs' brief in opposition to Simplicity's

motion for summary judgment (Doc. No. 40); third-party defendants' brief in opposition to Simplicity's motion for summary judgment (Doc. No. 37); and Simplicity's reply briefs thereto (Doc. No. 48-49). Also before this Court is third-party defendants' motion for partial summary judgment (Doc. No. 32); Simplicity' brief in opposition to third-party defendants' motion for partial summary judgment (Doc. No. 34); and third-party defendants' response thereto (Doc. No. 39).

For the following reasons, this Court grants Simplicity's motion for summary judgment on Counts I and II of plaintiffs' complaint; denies third-party defendants' motion for summary judgment on the negligent supervision allegations; and grants third-party defendants' motion for summary judgment on the failure to instruct allegation against Mrs. Shoff.

I. Background

Mr. Shoff purchased the mower from a Simplicity dealer in Honey Brook, Pennsylvania, in 1994 or 1995, eight or nine years before the accident. (See Mr. Shoffs Dep., attached as Ex. A to Def. Br., at 13-14). The mower was designed between 1991 and 1994, and assembled in 1994. (See Simplicity's Response to PI. Interrogatories, attached as Ex. B to Def. Br., at No. 2). Simplicity manufactured the mower on October 19, 1994. (Id.).

A. Structure of the Mower

The mower contains a 36" steel mower deck enclosing two rotating mower blades. (See Pictures of Mower, attached as Ex. C to Def. Br., at Nos. 2, 18, 29). The deck is positioned between the front and rear wheels, surrounding the perimeter of the blades. (Id., at Nos. 29, 30, 31). The operator enjoys control both over the engagement of the mower blades, which may be activated through a power take-off lever on the left side of the dashboard, and over the speed and direction of the tractor. (Id., at Nos. 2-5, 20, 26; see Operator's Manual, attached as Ex. D to Def. Br., at 6, 10). No physical barriers impede the vision of the operator from the seat located in the rear of the mower. (See Mr. Shoffs Dep., at 91-82; see Pictures, at Nos. 2-5).

Simplicity equipped the mower with three electrical safety systems. First, an interlock system prevents the engine from starting unless the transmission and blade controls are in stopped positions. (See Operator' Manual, at 7). Second, an operator presence control system automatically stops the engine and blades if the operator leaves the seat without first stopping the blades. (Id.). Third, an operator presence control system automatically stops the engine if the operator leaves the seat without first setting the parking brake. (Id.).

The mower was not equipped with a control system that prevents an operator from engaging the mower blades in reverse.

B. Product Warnings

The mower contained several warnings and instructions located at the operator's position on the machine, highlighted by the word "**WARNING**" (the "on-product warnings"). These on-product warnings were preceded by the caption "**AVOID SERIOUS INJURY OR DEATH,**" and included, *inter alia*, the following: "Look Down And Behind Before And While Backing"; "Do Not Mow When Children or Others Are Around"; "Read Operator's Manual"; and "Be Sure Blade(s) And Engine Are Stopped Before Placing Hands Or Feet Near Blade(s)". (See Pictures, at No. 16).

The Operator' Manual also contained a section entitled "**Safety Rules**," which, in turn, articulated principles of general operation and rules that concerned children (the "in-manual warnings"). The Operator's Manual stated that the failure to follow these rules "could result in loss of control of rider, severe personal injury or death to you, or bystanders, or damage to property or equipment." (See Operator's Manual, at 3). It further stated that compliance with the prescribed safety rules was particularly important because the "mowing deck is capable of amputating hands and feet and throwing objects."(Id.).

The Operator's Manual included, *inter alia*, the following rules with respect to the general operation of the mower:

GENERAL OPERATION

- Read, understand, and follow all instructions in the manual and on the unit before starting.

- Only allow responsible adults, who are familiar with the instructions, to operate the unit.

- Clear the area of objects such as rocks, toys, wire, etc., which could be picked up and thrown by the blade(s).

- Be sure the area is clear of other people before mowing. Stop unit if anyone enters the area.

- Never carry passengers.

- Do not mow in reverse unless absolutely necessary. Always look down and behind before and while traveling in reverse.

(See Operator's Manual, at 3).

The Operator's Manual provided the following rules with respect to children:

CHILDREN

- Tragic accidents can occur if the operator is not alert to the presence of children. Children are often attracted to

the unit and the mowing activity. Never assume that children will remain where you last saw them.

- Keep children out of the mowing area and under the watchful care of another responsible adult.

- Be alert and turn unit off it children enter the area.

- Before and when backing, look behind and down for small children.

- Never carry children. They may fall off and be seriously injured or interfere with the safe unit operation.

- Never allow children to operate the unit.

- Use extra care when approaching blind comers, shrubs, trees, or other objects that may obscure vision.

(See Operator's Manual, at 4).

C. Accident

An understanding of the factual circumstances leading up to the accident comes from three sources: (i) Mrs. Shoffs deposition; (ii) Mr. Shoffs deposition; and (iii) Mr. Shoffs statement to the insurance company on May 9, 2003.

1. Deposition Testimony

On May 7, 2003, Mr. Shoffs daughter dropped plaintiff off at the Shoffs' home. (See Mr. Shoff Dep., attacbed as Ex. A to Def Br., at 38). Later that afternoon, Mr. Shoff decided to mow his lawn. (Id., at 40). At the time, plaintiff was sitting on a couch watching television and Mrs. Shoff was in the kitchen. (Id., at 37-38; 39-40; see Mrs. Shoff Dep., attached as Ex. F, at 33). Mr. Shoff announced to his wife that he was going to cut the grass, and assumed that his wife would keep Ashley in the house during the task's duration. (See Mr. Shoff Dep., at 37, 88).

At the time of his deposition, Mr. Shoff did not recall the exact events leading up to Ashley's injury. However, Mr. Shoff did remember mowing the front lawn for about 30 minutes until he heard his wife "holler." (Id., at 35).[1] At that point, he remembered seeing his granddaughter lying on the ground behind the tractor, with her foot "cut off." (Id.). Mr. Shoff remembered backing up a "little bit" prior to the accident, although he was uncertain about the distance the mower traveled in reverse. (Id., at 72). Mr. Shoff did not recall whether he looked behind before putting the tractor in reverse. (Id, at 35-36, 79, 81-82). Mr. Shoff did admit that he read and understood the on-product warnings and the Operating Manual upon purchasing the tractor. (See Mr. Shoff Dep., attached as Ex. A to Def. Br., at 78-80).

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[1] Mrs. Shoff did not witness the accident. (See Mrs. Shoff Dep., attached as Ex. G to Def. Br., at 7). Instead, she arrived on the scene after hearing Ashley's cries, only to find Ashley on the ground behind the tractor. (Id., at 7-8).

Immediately after the accident, Mr. Shoff ran into his home and called an ambulance. (See Mr. Shoff Dep., at 35). Ashley was ultimately transported via helicopter to the Children's Hospital of Philadelphia, Pennsylvania. (See Compl., at ¶ 8). As a result of the incident, Ashley's left foot was amputated.(Id.).

2. Mr. Shoff's Insurance Statement

Mr. Shoff issued a statement to the insurance company on May 9, 2003, two days after the accident. This statement goes into greater detail about the events immediately preceding the accident. In this statement, Mr. Shoff indicated that, while he was mowing the lawn, Ashley came outside of the house, picked a flower from the flower bed, and proceeded to walk over to Mr. Shoff with the flower. (See Mr. Shoffs Statement, attached as Ex. 0 to PI. Br.). Seeing Ashley, Mr. Shoff lifted up the mower blade, while the engine of the mower was still running, accepted the flower, talked with Ashley, and then told Ashley to return to her grandmother. (Id.) Believing that Ashley was no longer in the area, Mr. Shoff then reapplied the mower blade, ran the mower in reverse, and ran over Ashley's foot. (Id.).

D. Complaint

Plaintiff filed a complaint against Simplicity on January 9, 2004. (Doc. No. I). The complaint contains two counts: a strict products liability claim (Count I) and a negligence claim (Count II) against Simplicity. (See Compl., at ¶¶ 10-12). The crux of

both claims is that the design of, and instructional warnings on, the mower were defective, both under a strict liability and a negligence analysis. (Id., at ¶¶10(f)-(l), 12). On March 9, 2004, Simplicity filed a third-party complaint against Mr. and Mrs. Shoff (Doc. No. 14), which was later amended (Doc. No. 19), alleging that Ashley's accident was due in part to the negligent conduct of Mr. and Mrs. Shoff. (See Am. Third Party Compl., at ¶¶ 10-11). Simplicity's third-party complaint seeks contribution in the event of a detennination of Simplicity's liability to plaintiffs. (See Am. Third-Party Compl., at ¶¶ 12-14). On March 3, 2005, Simplicity and third-party defendants filed the instant motions for summary judgment. (Doc. No. 32, 33).

II. Summary Judgment Motions

Two summary judgment motions are currently before the Court: (i) Simplicity's motion for summary judgment on plaintiffs' negligent design and strict product liability claims; and (ii) third-party defendants' motion for partial summary judgment on the negligent supervision and failure to follow instructions allegations of Simplicity's contribution claim.

A. Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to

judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Com., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material" Anderson, 477 U.S. 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

The movant has the initial burden of demonstrating the absence of genuine issues of material fact. This "burden .. may be discharged by 'showing' that there is an absence of evidence to support the non-moving party's case," Celotex Com. v. Catreet, 477 U.S, 317, 323 (1986). Once this burden is discharged, the non-movant must then establish the existence of each element on which it bears the burden of proof, See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in her favor. Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238,252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458,460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179,184 (E.D. Pa. 1995).

B. Simplicity's Summary Judgment Motion

Simplicity moves for summary judgment on plaintiffs' strict liability and negligence claims.

1. Strict Liability

The Pennsylvania Supreme Court has adopted Section 402A of the Restatement (Second) of Torts. Webb v. Zem, 220 A.2d 853 (1966). According to Pennsylvania's interpretation of Section 402A, a determination of whether a product is defective requires a two-step analysis: (i) whether, as a matter of law, the product was unreasonably dangerous to the intended user or consumer; and (ii) if so, whether as a matter of fact for the jury, the product was sold in a defective condition. See Azzarello v. Black Bros. Co., Inc., 391 A.2d 1020, 1026 (Pa. 1978). The "unreasonably dangerous" analysis requires the court to determine as a matter of policy whether the risk of loss should be placed on the supplier of the product based upon a risk-utility analysis. Id., at 1025-1026. If the Court determines that a product is "unreasonably dangerous," the issue of whether the product was sold in a defective condition is submitted to the jury. See, e.g., Monahan v. Toro Co., 856 F.Supp. 955, 958 (E.D. Pa. 1994).

Simplicity puts forth two arguments in favor of summary judgment: (i) Ashley was not an "intended" user of the product; and (ii) the mower was not "unreasonably dangerous" because plaintiffs cannot establish as a matter of law that a safer alternative design exists that would have prevented plaintiffs' injuries. Both of these arguments challenge whether the mower was unreasonably dangerous to the intended user or consumer of the product.

a. Intended User

Simplicity argues that in order for plaintiffs to prevail under their strict liability claim, they must establish that Ashley was an intended user or consumer of the product. Because Ashley was not the intended user of the mower, Simplicity argues that plaintiffs' strict liability claim fails as a matter of law. (See Def. Br., at 14).

Plaintiffs, on the other hand, argue that a strict liability claim under Pennsylvania law does not in all instances require the person who suffered injury to be the intended user of the product. (See Pl. Br., at 9-13). Instead, a strict liability claim may proceed when the plaintiff is an innocent bystander, independent of whether plaintiff was an intended user or consumer or whether the product was safe for its intended user or consumer. (Id.).

i. Restatement Principles

Pennsylvania has adopted Section 402A of the Restatement (Second) of Torts. See, e.g., Webb, 220 A.2d 853. Section 402A states:

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or

> consumer without substantial change in the condition in which it is sold.

See Restatement (Second) of Torts § 402A (1965). In other words, a strict liabibty claim under Section 402A requires a plaintiff to establish four elements: (1) the defendant sold a product; (2) the product was unreasonably dangerous to the ultimate user or consumer; (3) the defect was the proximate cause of injuries to the ultimate user or consumer; and (4) the product was in substantially the same condition at the time of the accident as when it was sold by the defendant. Id.

The commentary to Section 402A defines "user" and "consumer" in broad terms. See Restatement (Second) of Torts § 402A, at Comment 1. A "user" includes all persons who passively enjoy the benefit of the product, including all those who utilize a product for the purpose of doing work upon it. Yd. The term "consumer" is defined in equally broad terms, including all persons who use a product in its intended manner. Id. However, while defining the terms "consumer" and "user" broadly, the commentary acknowledges that courts have "not gone beyond allowing recovery to users and consumers," such as providing relief to casual bystanders and others who may "come in contact with the product." Id., at Comment O. Nonetheless, recognizing that "there may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded," the authors of Section 402A expressed no opinion as to whether "persons other than users or consumers" could (or, in

fact, should) recover under a strict liability theory for a defective product. Id.; see also Caveat 1.

The American Law Institute recently promulgated the Restatement (Third) of Torts. Section I of the Restatement (Third) of Torts simplifies the standard for strict liability previously contained within Section 402A:

> One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

See Restatement (Third) of Torts: Product Liability § 1 (1998) [2] The elision of the requirement that the plaintiff be the "user or consumer," coupled with its replacement by the phrase "harm to persons or property caused by the defect," suggests an intent to permit recovery under a strict liability theory to all persons affected by a defective product. Id.; see also Am. 1. Prod. Liab. 3d § 16:56 (2004) (suggesting that drafters "appear to be sanctioning claims by all

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[2] Under § 2 of the Restatement (Third) of Torts: Product Liability, a design defect exists "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe." Id. This conceptualization of "design defect" removes the "user or consumer" limitation, and permits recovery whenever a "product is put to uses that it is reasonable to expect a seller or distributor to foresee." Id., Comment m.

foreseeable persons affected by a defective product"). This broad class of potential plaintiffs includes bystanders harmed by a malfunctioning product.

ii. Pennsylvania case law

Pennsylvania jurisprudence has long interpreted Section 402A as requiring a manufacturer to ensure that a product leaves its control with every element necessary to make the product safe for its "intended use." Azzarello, 391 A.2d at 1027. Stated differently, a product will be deemed defective under Pennsylvania law only if it "left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." Id. This interpretation is grounded less in the text of Section 402A, than in the policy considerations associated with the concepts of "ultimate user and consumer," the definitions of which dictate whether a particular plaintiff may recover under a strict liability theory. See 3 West's Pa. Prac. § 9.66 (2004) (concept of intended use is "implicit" in Section 402A).

The "intended use" requirement has evolved, through judicial interpretation, into the rule that a product need only be made safe for its "intended user." Parks v. Allied Signal, Inc., 113 F.3d 1327, 1331 (3d Cir. 1997) ("plaintiff must show that a product is unreasonably dangerous to intended users for its intended use"; Metzgar v. Playskool, Inc., 30 F.3d 459, 463 (3d Cir. 1994) (manufacturer exonerated when "use giving rise to a strict liability cause of action is a reasonably obvious misuse, or the

user a reasonably obvious unintended user"); Mackowick v. Westinghouse Electric Corp., 575 A.2d 100, 102-103 (Pa. 1990) ("warning of inherent dangers is sufficient if it adequately notifies the intended user of the unobvious dangers inherent in the product"). The rationale for this evolution is the notion that the "intended use" doctrine presupposes the participation of an "intended user." Metzgar, 30 F.3d at 463. In turn, this logic then reasons that because a product need only be made safe for its intended user, only an intended user of the product may recover under Section 402A. See e.g., Riley v. Warren Manufacturing, Inc., 688 A.2d 221, 228-230 (Pa. Super. Ct. 1997) (manufacturer only liable for injuries to intended user or consumer).

The Pennsylvania Supreme Court recently addressed the "ultimate user" doctrine in the context of a design defect, answering the question of who may recover for a design defect under a strict product liability cause of action. In Phillips v. Cricket Lighters, 841 A.2d 1000 (Pa. 2003), a two-year old child reached into his mother's purse, retrieved a disposable butane cigarette lighter manufactured by defendant, used the lighter to ignite several linens, and started a fire that spread throughout the apartment. Id. at 1003. The two-year old child, his mother, and another minor child died in the fire. Id. One child, who managed to escape from the apartment, survived. Id. The administratrix of the estate of the three decedents, who was also the guardian of the sole surviving child, filed a complaint on behalf of all parties against the manufacturers and distributors of the

lighter, alleging a strict liability claim for failure to design the lighter with a child-resistant feature. Id.

The six justices who heard the case concluded that the strict liability claim on behalf of all injured parties (ie., the child who caused the fire by using the lighter and the bystanders) failed as a matter of law, albeit with different reasoning. Two justices reasoned that the "intended user" doctrine barred recovery because the butane lighter was intended to be used solely by adults, rather than by a two-year old child, and no evidence was introduced to indicate that the lighter "was unsafe for use by such an intended user." Id., at 1007, 1023. These justices emphasized that although the two-year old child might have been a reasonably foreseeable user, the concept of foreseeability, derived from negligence law, deserves no place within a strict liability framework. Id., at 1006-1008, 1023. [3]

On the other hand, three justices suggested a desire to retreat from the harsh application of the "intended user" doctrine. These justices expressed approval of the Restatement (Third) of Torts, and its blending of negligence principles into a strict liability design defect claim, including the replacement of the "intended user" doctrine with the "reasonably foreseeable use" standard. Id. at 1018-1019. However, as these three justices choose only to provide "prospective" guidance on how Pennsylvania law should progress, they applied "present" Pennsylvania law to find that the two-year old child was not the intended user of the lighter and that the

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[3] One justice concurred in this result, without articulating his reasoning.

strict products liability claim was barred. Id. at 1019.

Plaintiffs do not dispute that the holding in Philips--that a plaintiff must establish that a product was "unsafe for its intended user" to succeed on a strict liability claim--reflects the current state of Pennsylvania products liability law. However, plaintiffs seek to distinguish Philips by compartmentalizing its application of the intended user doctrine. Specifically, plaintiffs argue that although Philips addressed the intended user doctrine, particularly when a child "misuses" an allegedly defective product, this case did not intend to establish an exhaustive limit on what groups of plaintiffs may recover under § 402A, indeed, that this case did not intend to foreclose other classes of plaintiffs, such as innocent bystanders, from recovering on a strict liability claim. In other words, any person may recover whenever a defective product is being used in its intended manner, including innocent bystanders, but not when a defective product is being misused. Phrased yet again, the appropriate limitation on who may recover under a strict product liability theory is whether the product caused injury during its intended use, not whether an intended user suffered injuries. (See Pl. Br., at 11-12).

Plaintiffs attempt to buttress their position with case law from the Pennsylvania Supreme Court and from several federal district courts within the Third Circuit. Although plaintiffs admit that there "has not been express recognition by the Pennsylvania Supreme Court of a bystander's right

to bring a product liability claim" (Pl. Br., at 9), plaintiffs cite several Supreme Court cases that have permitted non-user/non-consumers to recover under a strict liability theory, thereby implicitly reaching the conclusion that bystanders may recover. See, e.g., Webb, 220 A.2d at 854 (permitting plaintiff to amend complaint to state claim under strict products liability theory for injuries suffered when he entered room in which exploding beer keg had been placed, even though plaintiff neither purchased nor used the keg); Pegg v. General Motors, 391 A.2d 1074, 1078-1079 (Pa. Super. 1974) (vacating directed verdict for manufacturer and granting new trial for plaintiff injured when allegedly defective chemical combusts in plaintiff's car). Furthermore, plaintiffs correctly note that several federal district courts in the Third Circuit have also permitted innocent bystanders, who were not the intended user of a product, to recover for injuries caused by a defective product under a strict liability claim. See, e.g., Stratos v. Super Sagless Com., 1994 WL 709375, at *5 (E.D. Pa. Dec. 21, 1994) (permitting administrator of seventeen month daughter's estate to bring strict liability claim against manufacturer of allegedly defective bed even though deceased was "non-user of the product who wandered into the product's danger zone"); Fedorchick v. Massey-Ferguson, Inc., 483 F.Supp. 60, 63-64 (E.D. Pa. 1977) (holding that Pennsylvania appellate courts would extend Section 402A's coverage to innocent bystanders).

Plaintiffs' analysis, although morally and logically appealing, is problematic within the framework of Pennsylvania law. First, as plaintiffs concede, no Pennsylvania appellate court has ever

expressly carved out an innocent bystander exception to Section 402A (ie., product must be safe for intended user and innocent bystanders who come into contact with product). Indeed, holdings from the Pennsylvania Supreme Court or the Pennsylvania Superior Court that seem implicitly to permit recovery for innocent bystanders may simply reflect the litigants' failure to raise an "intended user" defense before the trial court. See Pa. R. A. P., Rule 302 ("Issues not raised before the lower court are waived and cannot be raised for the first time on appeal.") Whatever the case may be, the failure of Pennsylvania's appellate courts to discuss and to recognize an innocent bystander exception to the intended user doctrine, indeed, their very silence on this issue, cannot be read as an implicit approval of the designated exception.

Second, recognition of an innocent bystander exception deviates from modem Pennsylvania products liability jurisprudence and the treatment of the intended user doctrine within this jurisprudence. For instance, most recently, six justices of the Pennsylvania Supreme Court reiterated that to recover under a strict liability cause of action, "the plaintiff must establish that the product was unsafe for its intended user," albeit with three justices expressing dissatisfaction with the narrowness of such a limitation. See Phillips, 841 A.2d at 1007. Applying this doctrine, the Phillips Court then denied recovery to those bystanders whose death was caused by a two-year old child's use of the lighter. To recognize a blanket innocent bystander exception, so that a manufacturer must make a product safe for its intended user and all bystanders

in proximity to the product during its application, would eviscerate the holding of the Phillips Court and its underlying rationale. It would also reject those Pennsylvania decisions applying the intended user doctrine that formed the precedential foundation for the Phillips decision. See, e.g., Van Buskirk v. West Bend Co., 100 F. Supp. 2d 281,285 (E.D. Pa. 1999) (guardians of child burned by allegedly defective fryer may not recover on strict product liability theory in part because child was innocent bystander, rather than intended user); Riley, 688 A.2d at 229 (affirming directed verdict in favor of manufacturer on strict liability claim because child who placed fingers into allegedly defective bulk feed trailer during grandfather's use of trailer was not the intended consumer or user of the product and had no reason to come in contact with it).

Finally, this Court fails to understand what principled distinction exists between an unintended consumer who suffers injuries through use (or misuse) of an allegedly defective product and a bystander who suffers injuries through proximity to an allegedly defective product. Any discernible distinction further disappears when the unintended consumer of the allegedly defective product is a small child who lacks the mental capacity to recognize and avoid such (mis)use. In other words, it would be patently unfair to deny recovery to a two-year child who is injured during her use of an allegedly defective adult product, while, at the same time, permitting the guardian of a two-year child to recover when an allegedly defective adult product malfunctions in the child's presence, causing injury.

The intended user doctrine resolves this paradox in favor of denying recovery for both classes of plaintiffs.

In summary, this Court expresses grave doubts as to the logic of preventing an innocent bystander from recovering for injuries caused by an allegedly defective product, particularly when the American Law Institute, through the Restatement (Third) of Torts: Product Liability, has retreated from the very genesis of the "intended user" doctrine (ie., Section 402A's ultimate user or consumer standard). However, as reiterated by the Phillips decision, the "intended user" doctrine, and its various permutations, remains the law of Pennsylvania. See, e.g., Riley, 688 A.2d at 229 (no recovery for child who is "obvious unintended user" of allegedly defective product). Accordingly, this Court is constrained to reason that the Pennsylvania Supreme Court would reject the decisions of Stratos and Fedorchick, which have expressly carved out an exception to the intended user doctrine for innocent bystanders, in favor of the unyielding rule that no subset of the population may recover under Section 402A, unless the product is unsafe for its intended user or consumer, however broadly defined.

iii. Application

Application of the intended user or consumer doctrine to the instant set of facts yields the conclusion that Ashley may not recover under a strict liability theory. Ashley did not purchase the mower from Simplicity. Nor was Ashley operating the tractor at the time she sustained injuries. In

fact, Ashley was not even a passive beneficiary of the mower's benefits, as she neither lived nor had an ownership interest in the Shoff's property. Furthermore, the on-product and in-manual warnings makes it clear that children are not to operate the mower, and, in fact, that the mower should not be operated in the presence of children. (See Pictures, at No. 16; Operator's Manual, at 3-4). Finally, plaintiff has not suggested, let alone made an evidentiary showing, such as through expert testimony, that the mower was dangerous for its intended user, an adult operator.[4] Consequently, because Ashley was an innocent bystander, rather than an intended user or consumer, and because plaintiffs have introduced no evidence to suggest that the mower was unsafe for its intended user, plaintiffs may not recover against Simplicity under Pennsylvania law for injuries Ashley sustained as a result of the alleged defect in the mower.[5] Simplicity's motion for summary judgment on Count I of plaintiffs' complaint is therefore granted.[6]

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[4] Plaintiffs' argument is that the mower was unsafe for minor bystanders who are "in the wrong place, at the wrong time," and who thereby come into contact with the blades of the mower. (See Pl. Br., at 12).

[5] Because this Court finds both that Ashley was not an intended user and that the mower was safe for its intended user, this Court need not decide whether innocent bystanders are always precluded from recovery under strict liability, even when the product at issue is unsafe for its intended user.

[6] Because this Court finds that the intended user doctrine precludes recovery by plaintiffs under a strict liability theory, this Court does not resolve Simplicity's alternative argument that the mower was not "unreasonably dangerous"

2. Negligence Claim

Simplicity argues that plaintiffs' negligence claim fails as a matter of law. First, Simplicity argues that it owed no duty of care to Ashley to design the mower with plaintiffs' proposed safety features. (See Def. Br., at 15-25). Second, assuming *arguendo* that Simplicity owed and breached a duty of care to Ashley, Simplicity argues that no causation exists because plaintiffs failed to identify a safer alternative design or warning that would have prevented Ashley's injuries. (Id., at 25).

a. Duty of Care

Whether a defendant owes a duty of care to a particular plaintiff is a question of law. See, e.g., Kleinknecht v. Gettsyburg College, 989 F.3d 1360, 1366 (3d Cir. 1993). To determine whether a defendant owes a duty of care under Pennsylvania law, a court must consider five factors: (i) relationship between the parties; (ii) social utility of the defendants' conduct; (iii) nature of the risk imposed and foreseeability of the harnl incurred; (iv) consequences of imposing a duty upon the defendant; and (v) the overall public interest in the proposed solution. Phillips, 841 A.2d at 1008; Althus v. Cohen, 756 A.2d 1166, 1168 (Pa. 2000). As no one factor is dispositive, a court must impose a duty of care when

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because plaintiffs failed to provide evidence of a safer, alternative design. (See Def. Br., at 25).

the balance of these factors weighs in favor of placing such a burden on a defendant. Id. at 1008-9.[7]

Based upon an analysis of the relevant factors, this Court concludes as a matter of law that Simplicity did not owe a duty to Ashley to design the mower in accordance with plaintiffs' proposed safety features.

i. Relationship Between The Parties

Simplicity argues that no relationship exists between Simplicity and Ashley, as Ashley did not purchase the subject lawn mower. (See Def Br., at 16). Plaintiffs admit that the relationship prong weighs in favor of no duty of care. (See Pl. Br., at 14 n.9).

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[7] The analysis of whether a manufacturer owes a duty of care to an injured plaintiff in a negligent design case is analogous to the inquiry of whether a court should place the loss on a particular manufacturer for designing a defective product in a strict product liability case. See, e.g., Schindler v. Sofamor, Inc., 774 A.2d 765, 774 n.7 (Pa. Super. Ct. 2001). Both require considerations of policy, rather than the application of moral precepts, and center upon the fundamental question of who should bear the risk of loss in a particular factual context.

Nonetheless, the two questions are, and must be kept, conceptually distinct, as the Pennsylvania Supreme Court has continuously mandated the disentanglement of negligent principles from the doctrines that comprise strict products liability jurisprudence. See Philips, 841 A.2d at 1007 (reaffirming that "negligence concepts should not be imported into strict liability law"). Indeed, the focus of the negligence analysis is on the manufacturer's conduct in designing, creating, and distributing a product, rather than upon the degree of perfection of the product itself.

ii. Social Utility of Defendants' Conduct

The social utility prong evaluates the social utility of producing a mower without additional safety features. Simplicity argues that a lawn mower is an effective, reliable, and convenient way to cut grass; that plaintiffs' proposed safety features do not increase the safety of the mower; and that any safety feature that would have prevented Ashley's accident, such as a lawn mower without *any* capacity to mow in reverse, undermines the machine's functionality. (See Def. Br., at 16-17). Plaintiffs, on the other hand, argue that a mower that lacks safety features to prevent and/or to minimize the risk of back-over injuries contains very little social utility. (See Pl. Br., at 14).

This Court finds that a lawn mower that lacks the capacity to mow in reverse loses a large degree of its social utility as an efficient and reliable tool to cut grass. Indeed, as Simplicity contends, operators frequently need to cut grass in reverse, depending on the contours of the landscape. Operators also need to reposition their mower by backing up. To deny operators the capacity to perform these basic maneuvers, with the mower deck engaged, would add significant time and frustration to the lawn-mowing task. Accordingly, this Court finds that there is substantial social utility to designing and manufacturing a mower that permits an operator to mow in reverse.

This Court also finds that plaintiffs have failed to present evidence indicating that an NMIR

device, which shuts down the mower if an operator engages the mower blades while operating in reverse, would increase the product's safety. According to plaintiffs' expert, E. Smith Reed, Jr., an NMIR feature, based upon 1994 technology, would still allow an operator to mow in reverse for at least 4 and 1/2, feet, while the blades are spinning, before the engine shuts off. (See Reed Report, at 25 n. 8). Furthennore, in 1993, the time the mower was manufactured, the Consumer Product Safety Commission ("CPSC") had expressly refused to promulgate a consumer standard requiring an NMIR device on riding mowers because of a lack of data about how many injuries would be prevented by the addition of a NMIR feature and because of the fear that the increased number of maneuvers demanded by a mower with a NMIR device would lead to operator frustration, which, in turn, would lead to the disabling of the device. [8] (See July 19, 1993 Letter from CPSC, attached as Ex. L to Def. Br.)[9] More problematically, although plaintiffs argue that a competitor of Simplicity, MTD Products Inc.

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[8] Plaintiffs' expert recalled a study from the late 1980's confirming that at least 40% of operators disabled NMIR features on their mowers. (See Reed Dep., at 113). Plaintiffs' expert further testified that he conducted no studies on the rate at which NMIR systems are disabled. (Id., at I 14).

[9] In fact, although the CPSC published a "proposed safety standard" in the Federal Register in 1977 requiring an NMIR device to be placed on all riding mowers, the CPSC withdrew this standard in 1984, on the basis that the CPSC could not "draw the statutorily required conclusion that the cost of incorporating the features needed to comply with the proposed requirements would be justified by any benefits to be obtained." (See Withdrawal of Proposed Rule, attached as Ex. F to PI. Br.).

("MTD"), started selling mowers with a NMIR device in 1982 and that this type of mower "completely eliminated backover blade contact accidents," Simplicity has provided several example of injuries arising from back-over accidents involving MTD-branded mowers, including a 2004 lawsuit filed on behalf of a four-year old child who was allegedly killed when an MTD riding mower backed over the child's body with the blades running. (See Examples of Back-over Accidents, attached as Ex. 0-R to Def. Reply Br.).[10] Finally, the Court notes that plaintiffs' expert presented no studies indicating that an NMIR device eliminates or significantly reduces back-over blade accidents. Indeed, plaintiffs' expert implicitly conceded during his deposition that such a comparative analysis was lacking because he performed no statistical analysis to determine: the rate of backover blade injuries for mowers with NMIR features with overrides; the difference in the rate of back-over blade injuries between mowers with NMIR features and those without such features; and the rate of back-over blade injuries for mowers with a disabled NMIR feature. (See Reed Dep., attached as Ex. H to Def. Br., at 10 I-I 02, 29-30, 112, 117-118). Accordingly, this Court finds not

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[10] Furthermore, this conclusion derives not from statistical analysis, but, instead, from the testimony of Gunter Plamper, MTD's Vice President for Product Development and Safety, both in a letter dated August 17, 200 I to Good Morning America and in a 1992 deposition in an unrelated action. (See August 17 Letter, attached as Ex. H to Pl. Br.; Reed Report, at 26-27). Tellingly, plaintiffs' expert admitted that he never read the entirety of Plamper's 1992 deposition, nor have plaintiffs attached this deposition to their brief in opposition to Simplicity's summary judgment motion. (See Reed Dep., at 31-32).

only that an NMIR device reduces the social utility of the mower, but also that plaintiffs have failed to present evidence to show that an NMIR device, as defined by plaintiffs' expert, increases safety by reducing back-over blade accidents.

Plaintiffs also identify an array of additional safety mechanisms that would permit an operator to mow in reverse, thereby maintaining the functionality of the mower, while, at the same time, increasing the social utility of the mower by reducing back-over accidents. These features include: (i) roller guards on the rear of the mowing deck to reduce the intrusion of objects into the mower blades; (ii) NMIR feature with an operator override; and (iii) additional warnings. (See Pl. Br., at 1; Reed Report, at 25-31); see, e.g., Philips, 841 A.2d at 1009 (comparing social utility of product without identifiable safety features with social utility of product with identifiable safety features).

Despite identifying these various safety mechanisms, however, plaintiffs have offered no evidence to indicate that such features, if implemented, would actually improve safety by decreasing back-over injuries. First, plaintiffs' expert refused to testify that the use of roller guards or other guarding near the mowing deck would make the mower "reasonably safe," in part because plaintiffs' expert lacked information "on the performance of rollers in preventing child back-over blade contact accidents." (See Reed Dep., at 84).

Second, plaintiffs' expert testified at his deposition that any NMIR device would have to be

accompanied by specific warnings, which plaintiffs' expert had yet to develop. (Id., at 95-96, 100-10 I, 199). Nor did plaintiffs' expert conduct testing to determine what language would be effective in stopping an operator from initiating the override and using the mower in reverse. (Id., at 95-96, 198-200). Furthermore, this Court fails to see how a "no mow in reverse device" with an override would prevent future back-over accidents, particularly because this feature would allow an operator to continue mowing in reverse by pushing a button or switch[11] This is the practical equivalent to the current design of the instant mower-both allow the operator to choose whether or not to mow in reverse, without first verifying the absence of persons immediately behind the mower.

Third, to the extent that plaintiffs argue that additional warnings would increase the safety of the machine, thereby also increasing its social utility, this Court fails to understand what additional warnings would be more effective in preventing back-over accidents, as Simplicity provided specific on-product and in-manual warnings prohibiting operation of the vehicle in the presence of children, commanding operators to look behind them before mowing in reverse, and delineating the physical consequences of failing to clear the field of operation of the mower's blades. (See Pictures, at No. 16;

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[11] Plaintiffs' expert admitted that he conducted no studies to determine whether an operator, using a mower with a NMIR feature with an override, was more likely to activate the override at the beginning of the mowing session or to disengage the mower deck prior to operating in reverse. (See Reed Dep., at 200).

Operator's Manual, at 3-4). Indeed, plaintiffs' own expert stated at his deposition that additional in-manual and on-product warnings, standing alone, would not be effective in preventing future accidents. (See Reed Dep., at 167-168).

This Court finds that a mower that permits an operator to maneuver in reverse, with the blades engaged, carries significant social value. This Court also finds that plaintiffs failed to make a showing that the proposed safety features would increase the safety of the machine by decreasing back-over accidents. Accordingly, because the implementation of plaintiffs' proposed safety features would decrease the social value of the product by thwarting its functionality as an efficient, time-effective tool for grass-cutting, without any concomitant increase in safety, this factor weighs against finding a duty of care on behalf of Simplicity.

iii. Nature of the Risk and Foreseeability of Harm

Simplicity argues that while a risk of injury to bystanders for a product with steel blades obviously exists, this risk is not so foreseeable as to warrant the imposition of an additional duty. In support of its argument, Simplicity points to the alleged statistical infrequency of back-over blade contact incidents. For example, since 1983, Simplicity claims that it was aware of just two other incidents where someone alleged that a mower Simplicity manufactured was involved in a back-over accident. (See Def. Br., at 22; Brackin Dep., attached as Ex. O to Def. Br., at 298-291).

Plaintiffs, on the other hand, adduce the expert report of Reed, who testifies that studies over the last thirty-five years reiterate "the frequency of children being backed over by ride-on mowers and the frequency of them coming in contact with the spinning blades." (See Plaintiffs' Expert Report, attached as Ex. A to PI. Br., at 19). Plaintiffs' expert testifies that back-over accidents involving mowers happen at a frequency of I accident per 5,000/6,000 mowers produced (over the lifetime of the mower) (Id., at 20). Plaintiffs' expert also testifies that more than 100 hospitalizations per year take place because of back-over blade contact accidents.(Id.).

This Court acknowledges that a risk of danger of back-over blade accidents exists whenever an operator uses the instant type of mower. This Court also recognizes that many studies adduced by plaintiffs' expert were published between 1981 and 1993 and that these studies provided the raw data to reach the statistical conclusion that 1 riding mower per 5,000 to 6,000 produced is involved in a back-over blade contact accident at some point during the mower's life-span. (See Reed's Report, at 18-22).

On the other hand, this Court also agrees that other factors undermine the forseeability of the risk of injury at the time of the design and manufacture of the mower. For instance, although the CPSC published a "proposed safety standard" in the Federal Register in 1977 requiring an NMIR device to be placed on all riding mowers, this proposed standard never took effect. (See Proposed Rule, attached as Ex. E to PI. Br., at 230). In 1984, the proposed standard was withdrawn, based upon the

inability of the CPSC to "draw the statutorily required conclusion that the cost of incorporating the features needed to comply with the proposed requirements would be justified by any benefits to be obtained." (See Withdrawal of Proposed Rule, attached as Ex. F to Pl. Br). Furthermore, in 1993, a year before the instant mower was assembled, the CPSC expressly refused to recommend implementation of a safety standard requiring manufacturers to incorporate NMIR devices. (See Terry Van Houten, Control Lawyout Report for Riding Mowers, attached as Ex. J to Def. Br., at 2). The CPSC stated that it lacked "sufficient information" to determine how many deaths or injuries would he prevented by [a no mow in reverse] feature." (See CPSC Letter, dated July 19, 1993, attached as Ex. L).[12]

This Court finds that a risk of back-over blade contact injuries exists and that this risk was somewhat foreseeable at the time of the design and manufacture of the instant mower. Nonetheless, as this risk of injury was not significant to justify promulgation by the CPSC of a final regulation mandating or voluntarily prescribing incorporation of NMIR devices, this Court finds that this factor only marginally points in favor of finding a duty of care on behalf of Simplicity.

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[12] Importantly, the CPSC drew this conclusion despite awareness of the very studies that plaintiffs' expert relied upon in forming his conclusion that a NMIR feature, coupled with additional warnings, would have prevented Ashley's injuries. (See Reed Report, at 30, 7-12). Indeed, plaintiffs' expert relied exclusively upon CPSC data in determining the rate of back-over blade injuries involving riding mowers. (See Reed Dep., at 17-19).

iv. Consequences of Imposing the Duty

Simplicity contends that although the costs of imposing a duty would be financially marginal, the social costs would be great. In particular, Simplicity contends that a NMIR feature would lead to operator frustration, thereby leading to additional injuries to the operator or other persons. (See Def. Br., at 23-24). On the other hand, plaintiffs evaluate the consequences prong in terms of financial and technological expenses. Plaintiffs contend that the expense of incorporating a NMIR device is minimal, costing approximately $9 per mower. (See Pl. Br., at 15 n.12).

This Court agrees with plaintiffs' argument that the financial costs of imposing a NMIR device are minimal.[13] However, because plaintiffs have failed to demonstrate a feasible design alternative that would reduce the likelihood of back-over blade accidents while maintaining the social utility of the product, imposing such a duty would be superfluous. It would certainly not justify the financial consequences, however marginal. This factor therefore weighs in favor of no duty.

v. Pubic Interest

Simplicity argues that the public interest would not be served by imposing a duty because this duty would transform Simplicity into the insurer of its products, an obligation that Pennsylvania law

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[13] Simplicity agrees with this conclusion, too. (See Def. Br., at 23.)

does not countenance. (See Def. Br., at 25). More specifically, Simplicity argues that the imposition of such a duty in this factual context would be an unfair way of penalizing Simplicity for the lack of adult supervision over Ashley on the date of the accident. This penalization is clear, according to Simplicity, when the consequences of the duty are identified: requiring the addition of a device with unproven effectiveness to minimize the risk to a person who should not be in the field of the product's operation. (Id., at 25).

Plaintiffs argue that this is precisely the situation in which the public interest is served by imposing a duty of care on Simplicity. The marginal costs of designing a product with a NMIR feature, coupled with the benefit of reducing severe physical injury to children, who often behave unpredictably, satisfy the public interest prong of the test. (See Pl. Br., at 15).

This Court finds that the public interest is not served by imposing a duty on Simplicity to design a mower with plaintiffs' proposed safety features. Simplicity's product included numerous safety features, as well as on-product and in-manual warnings prohibiting the use of the mower around children. More importantly, plaintiffs fail to establish a genuine issue of material fact as to the effectiveness (at the time of the design of the mower) of the proposed features, from rollers to an NMIR device to an NMIR device with an override, in increasing the safety value of the mower. To impose an additional duty on Simplicity to incorporate plaintiffs' proposed, but unproven, safety features

not only would devalue the social utility of the mower, preventing its ability to cut grass in a time-effective and efficient manner, but also would transform Simplicity into an insurer of its products in violation of Pennsylvania law. See Azarrello, 391 A.2d at 1024 (manufacturer not "insurer of all injuries caused by the product").

vi. Conclusion

In Phillips, the Court found that plaintiff made a sufficient showing to survive summary judgment on the issue of whether a cigarette lighter manufacturer owed a duty of care to two-year old child to design a product with a child safety feature. See 841 A.2d at 1010. However, unlike the factual pattern in Phillips, plaintiffs have presented no evidence to indicate that the design of the instant mower with additional so-called "safety" features would actually increase the safety of the mower, without impairing its social utility. Plaintiffs' failure to make such a showing is fatal to their negligence claim. Accordingly, weighing all of the relevant factors, this Court finds that Simplicity did not owe a duty to design and manufacturer the mower with plaintiffs' proposed safety features.[14]

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[14] Because this Court finds no duty of care as a matter of law, it need not address Simplicity's alternative argument that plaintiffs failed to introduce evidence of a reasonable, alternative design that would have prevented Ashley's injuries. (See Def. Rpl. Br., at 5).

C. Third-Party Defendants' Motion

Third-party defendants moved for summary judgment on the negligent supervision allegations against both Mrs. and Mr. Shoff and on the allegation against Mrs. Shoff for failure to follow instructions. Presumably, the entry of summary judgment in favor of Simplicity and the dismissal of plaintiffs' complaint moots the contribution claim against third-party defendants, and, hence, the need to resolve third-party defendants' motion for summary judgment. Nonetheless, in the event plaintiffs are successful on a motion for reconsideration or on appeal, and because Simplicity has not argued for dismissal based upon principles of mootness, this Court will decide third-party defendant' motion.

1. Negligent Supervision

Third-party defendants argue that liability for negligent supervision depends on whether the supervising party "had prior knowledge of a specific propensity for the child to act in the way that resulted in the injury taking place." (See Pl. Br., at 7). In turn, because third-party defendants had no knowledge of plaintiffs' propensity to enter the yard during the operation of the mower, third-party defendants cannot be liable under a negligent supervision theory. (Id.).

Simplicity, on the other hand, argues that Pennsylvania law does not require a showing of propensity. Instead, in order to state a negligent supervision claim against a guardian for failing to

control the conduct of a child, plaintiffs need only establish that the guardian knew or had reason to know both of her ability to control the child and of the necessity and opportunity for exercising control. (See Def. Br., at 3). Consequently, because third-party defendants testified that they knew plaintiffs could sustain a severe injury by coming into contact with the rotating mower blades, a jury could conclude that third-party defendants had a duty to keep Ashley in the house while Mr. Shoff mowed the lawn. (Id., at 4).

Both parties rely upon § 316 of the Restatement (Second) of Torts as governing Simplicity's contribution claim against third-party defendants for their alleged negligent supervision of Ashley. See K.H. v. J.R., 826 A.2d 863, 873 (Pa. 2003) (adopting and applying § 316). Section 316 states:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent: (a) knows or has reason to know that he has the ability to control his child; and (b) knows or should know of the necessity and opportunity for exercising control.

See Restatement (Second) of Torts § 316. The plain language of § 316 does not require a showing of propensity. In fact, the plain language of § 316 does

not even apply to this factual context--where a child injures herself (as compared to others) due to the alleged negligent supervision of a grandparent.

Third-party defendants cite no controlling case under Pennsylvania law that requires a showing of propensity (ie., guardian' knowledge that child may act in a certain way based upon Guardian's awareness of previous behavior) to prevail under a negligent supervision theory. Indeed, Pennsylvania law imposes a duty to exercise reasonable care to control a child when a parent "knows or should know of the need to exercise parental control and has the ability and opportunity to do so." J.R. v. Pellak, 764 A.2d 64, 68-69 (Pa. Super. Ct. 2000); see also K.R. v. J.R., 826 A.2d 863, 873 (Pa. 2003) (duty of parent to control conduct of child limited to those instances "in which a parent has the ability to control the child, knows of its necessity, and has the opportunity to do so"). Although knowledge of the propensity of a child to act in a certain manner based upon prior behavior may satisfy the "necessity" prong of this fact-intensive standard (ie., "knows or should know of the need to exercise parental control"), [15] third-party defendants present no Pennsylvania case law that prescribes this evidentiary path as the exhaustive method of satisfying the § 316 standard. Instead, under Pennsylvania law, a plaintiff may succeed on a negligent supervision claim under § 316 so long as

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[15] See Condel v. Savo, 39 A.2d 51, 53 (Pa. 1944) (permitting plaintiff to proceed on theory of negligent supervision against parents who failed to prevent their child from striking other children with sticks, as parents knew of their child's habit of causing such injury in such manner).

the particular facts demonstrate both that the guardian reasonably recognized or should have recognized the present imminence of harm absent parental control and that the guardian possessed the present ability and opportunity to exercise this control.[16]

Applying the principles of § 316, this Court concludes that facts exist from which a reasonable jury could find that both Mr. and Mrs. Shoff negligently failed to supervise Ashley, then four-years old, at the time of accident.[17] See Restatement (Second) of Torts § 316, comment c ("the very youth of the child is likely to give the parent more effective ability to control its actions and to make it more often necessary to exercise it). First, Mr. and Mrs. Shoff, as grandparents baby-sitting Ashley, had the ability and opportunity to control Ashley on the date of her injury. For instance, Mr. Shoff announced his decision to mow the lawn to his wife prior to commencing this task. (See Mr. Shoff Dep., at 37). As her husband started to mow the lawn, Mrs. Shoff was watching Ashley inside the house, with no physical barrier's obstructing Mrs. Shoffs view of Ashley. (See Mr. Shoff Dep., at 37-38; Mrs. Shoff

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[16] The logic of not *per se* requiring knowledge of a child's propensity to act in a certain manner to establish the "necessity" prong is even more cogent in the instant factual context, where the alleged parental negligence did not lead to a child's tortuous behavior against third parties, but, instead, to injury against Ashley directly.

[17] In so doing, this Court rejects third-party defendants' contention at oral argument that no facts exist to support defendants' negligent supervision claim, in the absence of a propensity requirement. (See Oral Argument, at 46).

Dep., at 33-36). Furthermore, in his insurance statement, Mr. Shoff testified that while he was mowing the lawn, Ashley approached the mower and spoke with him. (See Mr. Shoffs Insurance Statement, attached as Ex. 0 to PI. Br.). Rather than restraining Ashley, Mr. Shoff told Ashley to return to the house and then proceeded to continue to mow the law without guaranteeing Ashley's presence inside the home, away from the mower's field of operation. (Id.).

Second, both Mr. and Mrs. Shoff appreciated the risk of injury to Ashley if parental control was not exercised and if she was permitted to enter the mower's area of operation. Mr. Shoff conceded that he read the on-product and in-manual warnings documenting the possible ramifications of operating the mower in the presence of children. (See Mr. Shoff's Dep., at 7880). Per these warnings, Mr. Shoff acknowledged that Ashley could sustain an injury by coming into contact with the mower's blades. (Id.,at 80-81). Mrs. Shoff also recognized that Ashley could sustain severe injury from the blades of the mower if left unsupervised. (See Mrs. Shoff's Dep., at 23-25, 29-31). In fact, when he left the house to start mowing the lawn, Mr. Shoff assumed that Mrs. Shoff would keep Ashley inside the home because "she knows better." (See Mr. Shoff Dep., at 88).

Consequently, because facts exist from which a jury could find that third-party defendants negligently failed to supervise Ashley at the time of her accident, this Court denies third-party defendants' motion for summary judgment on the negligent supervision allegations. See Russell L.

Wald, II Am. Jr. Proof of Facts 2d 541 (2005) ("parent's failure to exercise due care in supervising and controlling the activities of his or her child, constituting negligent proximately contributing to the child's injury, is frequently a material issue of fact where recovery is sought for an injury caused by the negligence of a third person").

2. Failure to Follow Instructions

Third-party defendants argue that the claim of negligence against Mrs. Shoff for failure to follow instructions should be dismissed because Mrs. Shoff was not operating the mower at the time of the accident. (See Third-Party Def. Br., at 11). Defendants provide no substantive response to this argument.

This Court agrees that the failure to follow instructions theory of negligence liability against Mrs. Shoff should be dismissed. Mrs. Shoff was not operating the tractor, and thus had no responsibility to read the on-product or in-manual warnings. Simplicity's failure to respond to Mrs. Shoffs argument highlights the meritoriousness of this conclusion. Accordingly, this Court grants summary judgment to Mrs. Shoff on this component of Simplicity's negligence claim.

D. Conclusion

For the foregoing reasons, this Court grants Simplicity's motion to dismiss Counts I and II of plaintiffs' complaint; denies third-party defendants'

motion for summary judgment as to the negligent supervision claims; and grants third-party defendants' motion for summary judgment as to the allegation against Mrs. Shoff of failure to follow instructions. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

WAYNE BERRIER, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
SIMPLICITY CORPORATION	:	NO. 04-CV-97-LLD

ORDER

AND NOW, this 29th day of June 2005, upon consideration of Simplicity's motion for summary judgment on plaintiffs' negligent design and strict product liability claims (Doc. No. 33); plaintiffs' brief in opposition to Simplicity's motion for summary judgment (Doc. No. 40); third-party defendants' brief in opposition to Simplicity's motion for summary judgment (Doc. No. 37); Simplicity's reply briefs thereto (Doc. No. 48-49); third-party defendants' motion for partial summary judgment (Doc. No. 32); Simplicity' brief in opposition to third-party Defendants' motion for partial summary judgment (Doc. No. 34); and third-party defendants' response thereto (Doc. No. 39), it is hereby ORDERED as follows:

1. Simplicity's motion for summary judgment is GRANTED.

2. Third-party defendants' motion for summary judgment is GRANTED as to the failure to follow instructions allegation against Mrs. Shoff; and DENIED as to the negligent

supervision allegations against Mr. and Mrs. Shoff.

3. The Clerk of Court is directed to close this matter for statistical purposes.

BY THE COURT:

/s/
Legrome D. Davis, J.

Mortimer, Melissa

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Eastern District of Pennsylvania

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Case Number: 2:04-CV-97
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Docket Text:
MEMORANDUM OPINION AND ORDER THAT SIMPLICITY'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. THIRD PARTY DEFENDANTS MOTION FOR SUMMARY JUDGMENT IS GRANTED AS TO THE FAILURE TO FOLLOW INSTRUCTIONS ALLEGATION AGAINST MRS. SHOFF; AND DENIED AS TO THE NEGLIGENT SUPERVISION ALLEGATIONS AGAINST MR. AND MRS. SHOFF. THE CLERK OF COURT IS DIRECTED TO CLOSE THIS MATTER FOR STATISTICAL PURPOSES; ETC.. SIGNED BY JUDGE LEGROME D. DAVIS ON 6/29/05. 6/30/05 ENTERED AND E-MAILED.(jl,)

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DANIEL J. MANN
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PHILADELPHIA, PA 19103

[FILED: October 17, 2008]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

WAYNE BERRIER;	:	No. 13 EM 2008
BRENDA GREGG,	:	
IN THEIR OWN RIGHT AND	:	Petition for
AS PARENTS AND NATURAL	:	Certification of
GUARDIANS OF ASHLEY	:	Question of Law
BERRIER, A MINOR	:	
	:	
v.	:	
	:	
SIMPLICITY	:	
MANUFACTURING, INC.	:	
	:	
v.	:	
	:	
SUSIE SHOFF;	:	
MELVIN SHOFF	:	
	:	
PETITION OF:	:	
UNITED STATES COURT OF	:	
APPEALS FOR THE	:	
THIRD CIRCUIT	:	

ORDER

PER CURIAM

AND NOW, this 17th day of October, 2008, the Petition for Certification of Question of Law is

respectfully **DECLINED**. The Motion for Leave to Advise of Supplemental Authority is **DENIED**.

Mr. Justice Saylor files a Concurring Statement which is joined by Mr. Chief Justice Castille.

/s/ Patricia Johnson
Chief Clerk

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

WAYNE BERRIER;	:	No. 13 EM 2008
BRENDA GREGG,	:	
IN THEIR OWN RIGHT AND	:	Petition for
AS PARENTS AND NATURAL	:	Certification of
GUARDIANS OF ASHLEY	:	Question of Law
BERRIER, A MINOR	:	
	:	
v.	:	
	:	
SIMPLICITY	:	
MANUFACTURING, INC.	:	
	:	
v.	:	
	:	
SUSIE SHOFF;	:	
MELVIN SHOFF	:	
	:	
PETITION OF:	:	
UNITED STATES COURT OF	:	
APPEALS FOR THE	:	
THIRD CIRCUIT	:	

CONCURRING STATEMENT

MR. JUSTICE SAYLOR

FILED: October 17, 2008

I support the Court's decision to deny the petition for certification, but I wish to summarize my own rationale as follows.

The petition for certification seeks this Court's review in an arena in which there has been great difficulty achieving consensus. We recently accepted review of the foundational matter of whether the strict liability doctrine appropriately applies in design-defect cases. See Bugosh v. I.U. North Am., Inc., 942 A.2d 897 (Pa. 2008)(per curiam). With full appreciation and respect for the difficulties presented to the federal courts in predicting Pennsylvania law in this arena, at this juncture I believe that this Court's limited resources are best centered on the global issues. Notably, the federal courts are not without guidance as to current law, since, as the district court recognized, this Court has sent a clear signal that the intended-use doctrine is to be construed narrowly pending a decision on the foundational matters. See DGS v. United States Mineral Products Co., 898 A.2d 590, 600-01 (Pa. 2004).

I also note that the district court expressed "grave doubts" about the rationality of Pennsylvania's narrow application of the intended-use doctrine in strict liability theory, as the court believed that the doctrine serves to prevent recovery by innocent bystanders injured by defective products. Berrier v. Simplicity Corp., 413 F. Supp. 2d 431, 442 (E.D. Pa. 2005). However, fair compensation is not precluded by the intended-use doctrine. Rather, affected product-liability claims are channeled into negligence theory, where they may rise or fall on their merits. Cf. DGS, 898 A.2d at 604 ("[C]onsumers are protected by the availability of negligence theory to vindicate meritorious design-defect claims that are grounded

in negligence concepts, and in this setting, disputes may be resolved on a level playing field[.]"). Indeed, the district court implicitly recognized this, since it engaged in a full substantive review of the viability of the plaintiffs' negligence claim. See Berrier, 413 F. Supp. 2d 443-49. A complete and fair discourse concerning the reasonableness of the prevailing Pennsylvania strict-liability doctrine should include an understanding of alternative, available theories for recovery; the history and development of Section 402A of the Second Restatement; the distinction between manufacturing and design-defect cases; the history and development of Pennsylvania law in the design-defect arena; and prevailing inconsistencies and ambiguities which have arisen out of Pennsylvania's unique approach to the subject. See Phillips v. Cricket Lighters, 841 A.2d 1000, 1012-23 (Pa. 2003) (Saylor, J., concurring).

Finally, the district court's apparent perception of an injustice, as applied to the present case, is incongruent with its resolution of the plaintiffs' negligence claim. In this regard, the court engaged in a risk-utility analysis very similar to that required of courts as a threshold determination in the strict product liability setting, compare Berrier, 413 F. Supp. 2d at 443-48, with Fitzpatrick v. Madonna, 623 A.2d 322, 324-28 (Pa. Super. 1993); held that the plaintiffs had failed to adduce evidence of a feasible safer design alternative, see id. at 448;[1]

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[1] It seems clear that the plaintiffs' claim of an alternative safer design was at the center of both their negligence and strict liability claims. See Appx. 513-528; accord Duchess v. Langston Corp., 769 A.2d 1131, 1149 n.24 (Pa. 2001)(citing 63A Am. Jur. 2d Products Liability §1095 (1997)(explaining that

and concluded that imposing a duty to incorporate the proposed alternative design "would transform [the defendant] into an insurer of its products in violation of Pennsylvania law." Id. (citing Azzarello v. Black Bros. Co., 391 A.2d 1020, 1024 (Pa. 1978)).[2]

Ultimately, if the district court is correct in its risk-utility assessment and in its conclusion that the plaintiffs failed to establish a feasible alternative safer design, the rationale should serve as a complete disposition of both the negligence and strict-liability claims, and there should be no need for the Third Circuit to address the intended-use doctrine. If the district court is wrong on that score, then it would appear that the plaintiffs should be permitted to proceed to a jury determination, at least on their negligence claim. I express no opinion on the merits of the issue of alternative safer design -- it is referenced here only in the context of my rationale concerning the certification matter and to address the district court's stated concerns as they relate to the administration of justice in Pennsylvania.

Mr. Chief Justice Castille joins this concurring statement.

"[t]he reasonableness of choosing from among various alternative product designs and adopting the safest one if it is feasible is not only relevant in a design defect action, but is at the very heart of the case")).

[2] Azzarello, of course, is Pennsylvania's seminal strict-liability case, which expresses the concern that product suppliers should not be transformed into insurers against all injuries caused by the product. See Azzarello, 391 A.2d at 1024-25.

[FILED: June 16, 2009]

[J-159-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JUDITH R. BUGOSH, ADMINISTRATRIX OF THE ESTATE OF EDWARD J. BUGOSH, DECEASED AND JUDITH R. BUGOSH, IN HER OWN RIGHT	:	No. 7 WAP 2008
	:	Appeal from the Order of the Superior Court entered July 18, 2007 at No. 997 WDA 2006 affirming the judgment of the Court of Common Pleas of Allegheny County entered April 28, 2006 at No. GD04-018310.
v.	:	
I.U. NORTH AMERICA, INC., AS SUCCESSOR BY MERGER TO THE GARP COMPANY, FORMERLY KNOWN AS THE GAGE COMPANY, FORMERLY KNOWN AS PITTSBURGH GAGE AND SUPPLY COMPANY, E.W. BOWMAN, INC., EMHART GLASS INC.,	:	ARGUED: December 2, 2008

FORMERLY KNOWN :
AS EMHART :
MANFACTURING :
COMPANY, FORMERLY :
KNOWN AS HARTFORD :
EMPIRE, F.B. WRIGHT :
COMPANY, SURFACE :
COMBUSTION, INC. :
TAYLORED :
INDUSTRIES, INC. :
:
APPEAL OF: I.U. NORTH:
AMERICA, INC. :

DISSENTING STATEMENT

MR. JUSTICE SAYLOR
DECIDED: JUNE 16, 2009

Appeal was allowed to consider whether, in product liability actions in Pennsylvania, to move from Section 402A of the Second Restatement of Torts to Section 2 of the Third Restatement of Torts: Product Liability, thus substantially altering the liability scheme grounded on the seminal decision in Azzarello v. Black Brothers Co., 480 Pa. 547, 391 A.2d 1020 (1978). I reiterate my belief that Azzarello is severely deficient, particularly when measured against developed understanding and experience, and necessary adjustments are long overdue. Thus, I cannot support the decision to dismiss this appeal and permit another opportunity to go by the wayside.

I. Background

This is an appeal from a verdict favorable to the plaintiff in a product liability action based on asbestos exposure litigated against a non-manufacturer distributor. Appellee and her husband, now deceased, pursued recovery on a strict-liability, failure-to-warn theory under Section 402A of the Second Restatement. During the trial, Appellant, the defendant, sought the application of Section 2 of the Third Restatement by way of a motion in limine, which was denied in light of this Court's well-established precedent adopting Section 402A of the Second Restatement. The verdict was affirmed by the Superior Court, again based on this Court's settled precedent. See Bugosh v. Allen Refractories Co., 932 A.2d 901, 911 (Pa. Super. 2007) ("Until and unless our Supreme Court alters its approach to strict liability, we will continue to adhere to established principles.").

Nearly six years ago, the state of products liability law in Pennsylvania was discussed extensively in Phillips v. Cricket Lighters, 576 Pa. 644, 841 A.2d 1000 (2003) (plurality).[1] The lead opinion in Phillips strongly adhered to the course set by Azzarello, which held that, in the application of Section 402A of the Second Restatement, which imposes liability upon "[o]ne who sells any product

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[1] The subject of the underlying action in Phillips was harm caused by a fire originated by a child playing with a cigarette lighter. The specific question before this Court was whether the intended-use doctrine associated with strict product liability encompassed reasonably foreseeable uses. The Court's treatment of this issue subsumed foundational issues, discussed below.

in a defective condition unreasonably dangerous," the concept of "unreasonably dangerous" (or conversely due and reasonable safety) has no place before a jury. See Azzarello, 480 Pa. at 555-56 & n.9, 391 A.2d at 1025 & n.9. Azzarello's chief concern was with the protection of consumers exposed to mass marketing. See id. at 553, 391 A.2d at 1023-24. The Court sought to advance this aim in actions litigated under Section 402A by broadly couching manufacturers as guarantors of their products' safety, and by strictly forbidding consideration by jurors of reasonableness conceptions. See id. at 559, 391 A.2d at 1027.

Echoing Azzarello, the Phillips lead reiterated that "strict liability affords no latitude for the utilization of foreseeability concepts" grounded in negligence theory. Id. at 655, 841 A.2d at 1006 (citing Lewis v. Coffing Hoist Div., Duff-Norton Co., 515 Pa. 334, 341, 528 A.2d 590, 593 (1987) ("[N]egligence concepts have no place in a case based on strict liability."). This is so, the lead Justices explained, because in a strictliability action the product itself is on trial, and not the manufacturer's conduct. Id. (citing Kimco Dev. Corp. v. Michael D's Carpet Outlets, 536 Pa. 1, 7, 637 A.2d 603, 605-06 (1993), and Spino v. John S. Tilley Ladder Co., 548 Pa. 286, 292, 696 A.2d 1169, 1172 (1997)). Nevertheless, the lead opinion confessed error on the part of the Court in its own use of negligence concepts within the strict-liability arena. Id. at 655-56, 841 A.2d at 1006-07 ("While we have remained steadfast in our proclamations that negligence concepts should not be imported into strict liability law, we have muddied the waters at times with the careless use of negligence terms in the strict liability

arena." (footnote omitted)).[2] After indicating it would be imprudent to reverse all strict-liability decisions utilizing negligence terms, the lead opinion stated, "we can, and do, reaffirm that in this jurisdiction, negligence concepts have no place in strict liability law." Phillips, 576 Pa. at 656, 841 A.2d at 1007.

In concurrence, three Justices noted the incongruity in abiding the numerous accretions of negligence theory into strict-liability doctrine, while at the same time pronouncing they have no place there. Phillips, 576 Pa. at 664, 841 A.2d at 1012 (Saylor, J., joined by Castille, J., and Eakin, J.). Furthermore, it was noted, strict-liability theory at its core, as it has been applied in Pennsylvania, incorporates the principle of risk-utility (or cost-benefit) balancing, derived from negligence theory. See id. at 667-68 & n.5, 841 A.2d at 1013-14 & n.5 (citing, inter alia, Surace v. Caterpiller, Inc., 111 F.3d 1039, 1044-45 (3d Cir. 1997) (recognizing the "long hegemony" of cost-benefit analysis under Pennsylvania law))[3] The concurrence also developed

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[2] As an example, the Phillips lead referenced Davis v. Berwind Corp., 547 Pa. 260, 267, 690 A.2d 186, 190 (1997) (incorporating a foreseeability test into the product alteration scenario as applied within strict-liability theory).

[3] The Phillips concurrence highlighted that it was never the intention of the Second Restatement to render manufacturers insurers of their products, responsible for any and all harm caused from their use, regardless of the products' utility and relative safety. See Phillips, 576 Pa. at 667, 841 A.2d at 1013 (citing Azzarello, 480 Pa. at 555, 391 A.2d at 1025). Thus, the negligence-based risk-utility test was utilized to impose an appropriate limitation on liability. See id.

that, in design-defect cases,[4] the distinction between the character of a product and the conduct of the manufacturer in designing it is tenuous. See id. at 669, 841 A.2d at 1015 ("[M]anufacturers consciously choose how to design their products. Asking whether the product is reasonable tends to circle back to asking whether the manufacturer used due care in designing it." (quoting Richard L. Cupp, Jr. and Danielle Polage, The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis, 77 N.Y.U.L. REV. 874, 893 (2002))). The concurrence explained that Pennsylvania's attempt to isolate strict-liability theory in its entirety from negligence theory: was not supported by the author of the seminal article on which the Court had relied, see Phillips, 576 Pa. at 666, 670, 841 A.2d at 1014-15;[5] has led to risk-utility balancing by trial courts on facts most favorable to the plaintiff (to avoid entangling the trial judge in determining factual questions assigned to the jury under Azzarello); and has yielded minimalistic jury instructions (to insulate the jury from negligence terminology) which lack essential guidance concerning the key conception of product defect. See id. at 672-74, 841 A.2d at 1017-18.

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[4] The discussion in Phillips centered on design-defect cases, given that liability was pursued in the underlying action via that theory.

[5] Indeed, Dean John W. Wade of Vanderbilt University emphasized that, in his discussions, the strict-liability dynamic pertained to the plaintiff's burden of establishing due care in the manufacture/supply process; whereas, concepts derived from negligence theory serve a critical role at other stages (or in other aspects) of the liability assessment. See id.

The concurring Justices found that the Third Restatement approach illuminates the most viable route to providing essential clarification and remediation, by: preserving traditional strict liability for manufacturing defects; endorsing a reasonableness-based, risk-utility balancing test as the standard for adjudging the defectiveness of product designs; and relegating the cost-benefit analysis to the jury, guided by appropriate instructions (where sufficient evidence has been presented to preclude summary judgment or a directed verdict). See Phillips, 576 Pa. at 675-79, 841 A.2d at 1019-21; see also DGS v. United States Mineral Prods. Co., 587 Pa. 236, 254, 898 A.2d 590, 601 (2006) (referencing the position of the Phillips concurrence, given its conclusion that there are substantial deficiencies in present strict-liability doctrine, "it should be closely limited pending an overhaul by the Court").

Presently, Appellant aligns its primary argument with the Phillips concurrence, contending that, in light of its rational grounding in the context of manufacturing defects, strict liability has been "stretched beyond reason" in the way it has been extended to design-defect and failure-to-warn cases. In addition to the Phillips concurrence, Appellant discusses the thoughts of other judges, scholars, and commentators who, over the past thirty years, have addressed the conceptual difficulties which have surfaced as a result of the way Section 402A has been interpreted and applied. Such discourse, Appellant notes, motivated the recommendations advanced in the Third Restatement. Appellant contends that the changes advocated in the Third Restatement do not mark a radical departure from

Section 402A, but rather, "fine tune" existing strict liability law to achieve greater fairness in these distinct types of claims. According to Appellant, whereas the Second Restatement is silent regarding when a product is defective, the Third Restatement provides appropriate guidance. Appellant suggests that the Third Restatement reflects the trend in product liability litigation nationwide, would clarify and streamline the law in Pennsylvania, and would result in a more just and cost-effective resolution of product liability lawsuits.

One of Appellant's amici, the Products Liability Council, puts the argument more bluntly, as follows:

> Azzarello was in tatters when the Court decided Phillips. The three concurring Justices in Phillips recognized that the Azzarello negligence/strict liability dichotomy is beset by "pervasive ambiguities and inconsistencies." Although attempting to retain Azzarello, even the lead opinion in Phillips had to admit how murky the dichotomy had become. Judicial resort to such negligence concepts in strict liability cases was so widespread that the lead opinion concluded "it would be imprudent for us to wholesale reverse all strict liability decisions which utilize negligence terms." These cases are indeed legion. While overruling them all would surely be "imprudent," Phillips left their status fundamentally uncertain. Are these prior precedents

employing negligence principles still viable, or not? Should they be followed, ignored, or modified in some unstated way?

* * *

By offering lower courts no guidance on how to treat the dozens of cases employing "reasonableness" and "foreseeability" standards in so-called "strict liability," General Services and Phillips have left core principles of Pennsylvania product liability law profoundly unsettled. Where as here "the practical application of [a] doctrine has become enigmatic," and there exists "a lack of consistency in the lower courts" -- "[t]his indicates to us that the application of the [doctrine] has proved to be unworkable." Jacobs v. Halloran, 551 Pa. 350, 358, 710 A.2d 1098, 1102-03 (1998). When fine lines drawn between related doctrines give rise to a "labyrinth of formal distinctions" and to the "unnecessary befuddlement of [ ] simple legal proposition[s]," it is time to seek another way. Gilbert v. Korvette, Inc., 457 Pa. 602, 609, 611, 327 A.2d 94, 99 (1974).

* * *

Thirty years after Azzarello, the relationship of negligence and strict liability in product liability litigation is

> rife with confusion, obscure notions, and legalistic distinctions that do "not . . . comport with common experience and understanding," and which fully justify "overrul[ing] that decision." Banks Eng'g Co. v. Polons, 561 Pa. 638, 643, 752 A.2d 883, 886 (2000).

Brief for Amicus Product Liability Advisory Council, Inc., at 28-29, 32-34 (citations and footnote omitted); see also id. at 41 ("Adoption of the Third Restatement's single, unitary defect standard is needed to eliminate the current doctrinal confusion, and to create a system where juries receive adequate instructions and are not confused by redundant theories of liability.").

Appellee, on the other hand, contends that, particularly given the long-standing tenure of Azzarello, any modifications constitute policy making which is more properly left to the Legislature. Accord Program Admin. Servs., Inc. v. Dauphin County Gen. Auth., 593 Pa. 184, 192, 928 A.2d 1013, 1017-18 (2007) ("[I]t is the Legislature's chief function to set public policy and the courts' role to enforce that policy, subject to constitutional limitations."); Naylor v. Township of Hellam, 565 Pa. 397, 408, 773 A.2d 770, 777 (2001) (recognizing the Legislature's superior ability to examine social policy issues and determine legal standards so as to balance competing concerns).

On the merits concerning whether to adopt the Third Restatement position, Appellee does not specifically refer to the concerns of the concurring Justices in Phillips. Rather, Appellee criticizes the

Restatement as an inappropriate attempt at tort reform orchestrated by members of the business and insurance communities. See Brief for Appellee at 24 ("[T]he Restatement was heavily influenced by, if not the product of, insurance, business, and manufacturing interests."). Appellee invokes the doctrine of stare decisis and contends that any decision folding a Restatement section into a state's common law must be a natural development of the existing law. While recognizing in the abstract that many significant legal issues with respect to the direction of Pennsylvania's law of product liability exist, Appellee urges that this Court should not "cede the discussion" to a private organization such as the American Law Institute. See id. at 27 (citing Marshall S. Shapo, In Search of the Law of Products Liability: The ALI Restatement Project, 48 VAND. L. REV. 631, 685-86 (1995) ("To put the point more baldly, the ALI should not undertake to make law for judges.")). According to Appellee, although wide acceptance may be claimed, the Third Restatement position draws support from the common law of only a few states. See Brief for Appellee at 25 (citing John F. Vargo, The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects--A Survey of the States Reveals a Different Weave, 26 U. MEM. L. REV. 493, 536-37 (1996)).

Appellee's brief places strong focus on the public policy concern of protecting innocent consumers, which motivated Section 402A and Azzarello. Appellee notes that Pennsylvania's law of product liability is deeply rooted in the concept that the manufacturer who places a product in the commercial stream is in a better position than the

consumer to take steps to reduce the risk of injury from its product, or to bear the costs of injuries that do result from the use of its product. According to Appellee, a return to a fault-based system would undermine such purposes by increasing the plaintiffs' burden of proof, perhaps to an insurmountable level. In this regard, Appellee criticizes, in particular, the Third Restatement's endorsement of a requirement that plaintiffs establish the availability of an alternative, safer design to pursue liability under a design-defect theory. See Restatement (Third) of Torts: Products Liability § 2(b). Appellee further opposes any consideration of industry standards or state of the art in strict product liability actions, contrary to current Pennsylvania law. See Lewis, 515 Pa. at 343, 528 A.2d at 594; Carrecter v. Colson Equip. Co., 346 Pa. Super. 95, 103, 499 A.2d 326, 330-31 (1985). Finally, Appellee asserts that adoption of the Third Restatement would reduce the incentive to product manufacturers and suppliers to distribute safer products. Accord Kimco, 536 Pa. at 9, 637 A.2d at 607 (positing that the "deterrent effect of imposing strict product liability standards would be weakened were we to allow actions based upon it to be defeated, or recoveries reduced by negligence concepts. We will not countenance such a development.").

The legal community obviously has taken acute notice of the Phillips divide, which the present appeal was selected to finally resolve. This appeal has attracted comprehensive briefing, not only from

the litigants, but also from numerous amici.[6] Given the important future interests at stake, the Court is presented with advocacy on key doctrinal questions which is extensive, impressive, and zealous.

II. The Merits

A. Revisiting Azzarello

Phillips amply demonstrates that the core problem in the application of prevailing Pennsylvania law lies in the insistence on maintaining a doctrinal assertion that there is no negligence in strict liability, when, functionally, the law of "strict" products liability is infused with negligence concepts. Although this fundamental incongruity was at the heart of the dispute in Phillips, in the present case, none of the briefs

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[6] On Appellant's side, these include the Pennsylvania Defense Institute, the Product Liability Advisory Council, Inc., Pennsylvania Chamber of Business and Industry, Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Association of Manufacturers, NFIB Small Business Legal Center, National Association of Wholesaler-Distributors, American Tort Reform Association, American Insurance Association, Property and Casualty Insurers Association of America, National Association of Mutual Insurance Companies, American Chemistry Council, Washington Legal Foundation, Sherwin-Williams Company, United States Steel Corporation, Textron, Inc., and Beazer East, Inc. Appellee's amici are the American Association for Justice, Pennsylvania Association for Justice, Pennsylvania AFL-CIO, Local 449 Steamfitters, Local 2 Asbestos Workers, United Steelworkers, United Union of Roofers, Waterproofers and Allied Workers, Local No. 30, and International Association of Heat and Frost Insulators and Allied Trades, Local No. 14.

defending current law squarely addresses it.[7] No one has advised the Court how it is that we can go forward, in resolving the numerous unsettled issues of product liability law, predicating a just and sensible jurisprudence on rhetoric so disharmonious with actual practice.

I have respect for counsel advocating the status quo and no intention of criticizing their skill or awareness of the issues. Rather, I believe they are confronted with the same difficulty faced by this Court -- a serious misalignment between the descriptions of our strict liability doctrine and its actual operation. [8] The Phillips lead opinion appears to have made the best of what can be done with the situation with the following expression:

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[7] Certainly, the briefs of Appellee and her amici rely on this Court's statements that negligence concepts do not belong in strict liability doctrine. They offer little, however, to explain how this notion can be rationally squared with a strict-liability regime which, in material respects, overlaps with negligence theory.

[8] See generally 1 MADDEN & OWEN ON PRODUCTS LIABILITY §5:10 (3d ed. 2008) (explaining that "the rhetoric of 'strictness' proved so potent and uncompromising that it hampered the reasoned evolution of the doctrine over time. The products liability law-in-practice continued to develop, but the language of the law (its doctrine) failed to keep pace."); William A. Worthington, The "Citadel" Revisited: Strict Tort Liability and the Policy of Law, 36 S. TEX. L. REV. 227, 240 (1995) (positing that, as a result of the courts' application of a loss-spreading rationale in the tort context, "legal analysis became contorted as courts struggled to reconcile compensation with traditional tort principles. Ultimately, the credibility of our legal system has suffered.").

> While it would be imprudent of us to wholesale reverse all strict liability decisions which utilize negligence terms, we can, and do, reaffirm that in this jurisdiction, negligence concepts have no place in strict liability law.

Phillips, 576 Pa. at 556, 841 A.2d at 1007. On such a foundation, however, it is very difficult to move forward to decide the numerous unsettled issues of law connected with strict liability doctrine consistent with the core principles. Admittedly, we have cases which incorporate negligence concepts into strict liability doctrine -- we will not (and cannot justly) overturn them -- and so negligence concepts clearly do have a place in strict liability law. How is it, then, that we may continue to require courts and litigants to continue to say they do not?

When product liability law initially was being shaped, like this Court, many others envisioned a categorical divide between strict-liability and negligence concepts. See, e.g., Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1161 (Cal. 1972). This was most readily justified in the "prototype" cases involving manufacturing defects, in which "something went wrong in the manufacturing process, so that the product had a loose screw or a defective or missing part or a deleterious element, and was not the safe product it was intended to be." John W. Wade, On the Nature of Strict Tort Liability for Products, 44 MISS. L. J. 825, 831-32, 837 (1973). Once the foundation for strict liability was laid, however, claims involving two other categories of defects, design and warning defects, proliferated. As the treatment of these broader categories evolved,

most courts came to realize that application of strict liability in design and warning cases was far more problematic than in the manufacturing-defect paradigm. Particularly in light of the tort system's largely open-ended damages scheme, and the impossibility of designing products incapable of contributing to human injury, doctrinal limiting principles were necessary to contain the liability of product manufacturers and suppliers. See, e.g., Prentis v. Yale Mfr'g Co., 365 N.W.2d 176, 181-82 (Mich. 1984).[9] The alternative, it was widely recognized, was to sanction what would be, effectively, a scheme of mandatory insurance imposed by the judiciary on the business community, an idea foreign to the judicial function and

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[9] See generally David G. Owen, Design Defects, 73 MO. L. REV. 291, 353 (2008) ("In holding manufacturers responsible for defects in design, courts and commentators have always sought to avoid absolute liability, recognizing that the concepts of design safety and design danger are matters of degree involving trade-offs between a product's usefulness, cost, and safety."); id. at 299 ("As the strict manufacturer liability principles of . . . Restatement (Second) of Torts §402A spread across the nation in the 1960s and 1970s, courts and commentators searched mightily for standards or 'tests' of liability that would stop liability well short of absolute.").

Various social policy and pragmatic justifications for limiting the liability of manufacturers include: incentivizing safer design by rewarding careful manufacturers; the recognition that a verdict for a plaintiff in a product liability case is tantamount to a determination that an entire product line is defective, and therefore, the higher threshold of fault is justified; a fault system incorporates greater intrinsic fairness by not burdening manufacturers and their customers with the cost of insuring against all possible losses; and liberalized modern discovery rules should enable plaintiffs to learn the facts surrounding manufacturers' deliberate design decisions. See Prentis, 365 N.W.2d at 185.

unpalatable in any jurisdiction.[10] In furtherance of establishing essential boundaries and reconciling strict liability doctrine with the historical grounding of tort law in notions of corrective justice, risk-utility balancing -- an approach derived from negligence theory -- attained wide-scale recognition as a rational limiting principle. See Moyer v. United Dominion Indus., Inc., 473 F.3d 532, 539-41 (3d Cir. 2007); Prentis, 365 N.W.2d at 183.[11]

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10 This Court previously has eshewed the notion of a pure loss spreading tort system. See, e.g., Cafazzo v. Central Med. Health Servs., Inc., 542 Pa. 526, 535, 668 A.2d 521, 526 (1995) ("To assign liability for no reason other than the ability to pay damages is inconsistent with our jurisprudence."); Coyle v. Richardson-Merrell, Inc., 526 Pa. 208, 217, 584 A.2d 1383, 1387 (1991) (finding "[r]eliance on cost-shifting as the only factor to be considered in whether a given party should be exposed to liability" insufficient to support liability because it "would result in absolute liability rather than strict liability").

11 Countering the loss-spreading rationale, courts and commentators came to recognize the impact on business of an expanded liability scheme grounded on such principle. For example, one commentator indicated:

> Between 1971 and 1976, the cost of product liability insurance premiums increased drastically. According to 1984 Department of Commerce statistics, America's foreign competitors had insurance costs twenty to fifty times lower than their American counterparts...
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> Not only is insurance unobtainable for many manufacturers, the tort system is not an effective insurance delivery mechanism. A study by the Rand Corporation's Institute for Civil Justice found that the legal system incurred a total transaction cost of $16 to $19 billion to deliver $14 to $16 billion of net

In its effort to justify curtailing the application of negligence-based principles in Pennsylvania's strict product liability regime, Azzarello relied on two judicial decisions -- the California Supreme Court's seminal opinion in Cronin and a New Jersey court's decision in Glass v. Ford Motor Co., 304 A.2d 562 (N.J. Super. Ct. Law Div. 1973). Azzarello did not recognize, however, that Cronin already was widely criticized as providing no useful definition of the central concept of product defect in design-defect cases. See, e.g., Cepeda v. Cumberland Eng'g Co., 386 A.2d 816, 826 (N.J. 1978) (citing Wade, On the Nature of Strict Tort Liability for Products, 44 MISS. L.J. at 834-35, 837; W. Page Keeton, Product Liability And The Meaning Of Defect, 5 ST. MARY'S L.J. 30, 37-38 (1973)), overruled on other grounds and modified in Suter v. San Angelo Foundry & Machine Co., 406 A.2d 140, 148, 153 (N.J. 1979), superseded in part by

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> compensation to plaintiffs. According to Professor George L. Priest of Yale University School of Law, the result of the expanded tort liability has been to "shift insurance delivery to a third-party mechanism." He views such a system as inefficient. It provides insurance in excess of consumer demand, and the administrative burden is approximately 2.75 to 5.75 times greater than a first-party delivery system.

Worthington, The "Citadel" Revisited, 36 S. TEX. L. REV. at 250-52 (citations omitted). The point here is not to accept or adopt these particular assertions. Rather, my aim is merely to recognize the difficulty of the judiciary maintaining a loss-spreading scheme detached from fault without seriously considering the empirical validity of underlying assumptions about the societal impact of the scheme.

2A N.J. Stat., Ch. 58C. Indeed, Cronin was curtailed by the California high court soon after its issuance, based on the recognition that "it is simply impossible to eliminate the balancing or weighing of competing considerations in determining whether a product is defectively designed or not." Barker v. Lull Eng'g Co., 573 P.2d 443, 456 (Cal. 1978). Thus, the court expanded on Cronin in an effort to give content to the concept of defect and permit risk-utility balancing by jurors. See id. at 456-57.[12]

Further, in the ensuing decades, the California Supreme Court has "repeatedly held that strict products liability law in California may incorporate negligence concepts without undermining the principles fundamental to a strict liability claim." Johnson v. American Standard, Inc., 179 P.3d 905, 916 (Cal. 2008). Again, this is the tribunal that pioneered strict liability under Section 402A and was the central source of authority referenced in Azzarello for the proposition that negligence concepts have no place in strict-liability theory. See Azzarello, 480 Pa. at 555, 391 A.2d at 1025 (quoting Cronin, 501 P.2d at 1161).

The only other judicial decision upon which Azzarello relied in eschewing negligence concepts is Glass. See Azzarello, 480 Pa. at 555-56, 391 A.2d at 1025. There, a New Jersey court held that the unreasonably-dangerous element had no valid place

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[12] The single reference to this Court's Azzarello decision in California case law appears in a dissenting opinion in Finn v. G.D. Searle & Co., 677 P.2d 1147 (Cal. 1984), in which Chief Justice Bird dismissed Azzarello's approach as "extremely vague and . . . difficult to follow." Id. at 1168 n.17 (Bird, C.J., dissenting).

in strict-liability doctrine based on the rationale that "[t]he notions of negligence and of strict liability . . . . are antithetical to each other." See Glass, 304 A.2d at 564. Azzarello failed to recognize, however, that Glass already had been disapproved, in relevant part, by the New Jersey Supreme Court. See Cepeda, 386 A.2d at 829 (explaining that "[t]he Restatement criterion of 'unreasonably dangerous' remains soundly applicable" to design defect claims and disapproving Glass to the extent it held to the contrary).

An accurate account of New Jersey's then-prevailing approach to strict liability would encompass the New Jersey Supreme Court's acute understanding of the criticisms Cronin had generated. See Cepeda, 386 A.2d at 829 ("As stated by Dean Keeton . . ., 'the difficulty is that no content was given (by Cronin) to the concept of defect and this is vitally important when a plaintiff's theory is that a product, although fabricated and constructed as it was intended to be, subjected users or others to an inherent risk of harm that made the product defective.'" (quoting Keeton, Product Liability and the Meaning of Defect, 5 ST. MARY'S L.J. at 30-32)). Cepeda also recognized, fundamentally, that "'demanding that the defect render the product unreasonably dangerous reflects a realization that many products have both utility and danger.'" Id. at 826 (quoting, indirectly, Ross v. Up-Right, Inc., 402 F.2d 943, 946 (5th Cir. 1968) (emphasis added)). For this reason, the court accepted the critical distinction between manufacturing and design defects, as well as the necessary role of the unreasonably dangerous requirement in the liability scheme, explaining:

> The heart of the approach we take toward resolution of the matter of defendant's affirmative liability in this case calls for a careful distinction between ordinary manufacturing defects and defects of design.
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> [T]he point to be made is that in design defect liability analysis the Section 402A criterion of "unreasonably dangerous" is an appropriate one if understood to render the liability of the manufacturer substantially coordinate with liability on negligence principles. The only qualification is as to the requisite of foreseeability by the manufacturer of the dangerous propensity of the chattel manifested at the trial this being imputed to the manufacturer. "Since the proper design is a matter of reasonable fitness, the strict liability adds little or nothing to negligence on the part of the manufacturer."

Cepeda, 386 A.2d at 824-25 (citing, inter alia, W.L. PROSSER, TORTS 659 n. 72 (1971)).[13]

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[13] After Azzarello's issuance, in Suter the New Jersey Supreme Court indicated the jury should be charged "in terms of whether the product was reasonably fit, suitable and safe for its intended and foreseeable purposes . . .." Suter, 406 A.2d at 153. Both the "unreasonably dangerous" and "due safety" formulations specifically had been rejected by Azzarello in terms of jury instructions. See Azzarello, 480 Pa. at 555-56 & n.9, 391 A.2d at 1025 & n.9.

Whereas Glass had attempted to remove the "unreasonably dangerous" criterion from the Section 402A analysis, the Cepeda court placed the matter squarely before New Jersey juries by approving an instruction requiring a determination that a product is in a "defective condition unreasonably dangerous." Cepeda, 386 A.2d at 827, 829 ("It will suffice for purposes of the case at bar, which is clearly a situation of alleged design defect, that the Restatement criterion of 'unreasonably dangerous' remains soundly applicable thereto. To the extent that the decision in [Glass] may be read to the contrary, it is herewith disapproved.").[14] Azzarello was remiss in its failure to discuss such reasoned, developing counter-positions, particularly as they

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[14] See generally 1 MADDEN & OWEN ON PRODUCTS LIABILITY § 2:10 ("[A]s courts applied the new 'strict' liability doctrine to product manufacturers and other defendants in an increasing array of contexts, many courts and legislatures began to recognize that liability for the manufacture and sale of products containing design and warning defects is best defined in terms of the principles of negligence law, centered on the balance of foreseeable risk, cost, utility, reasonableness, and optimality.").

The New Jersey Supreme Court later experimented further with more absolute forms of strict liability, see Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 549 (N.J. 1982), but it retreated in Feldman v. Lederle Laboratories, 479 A.2d 374, 388 (N.J. 1984) (limiting Beshada to its facts). See generally David G. Owen, The Evolution of Products Liability Law, 26 REV. LITIG. 955, 979 (2007) (indicating that "the significance of Feldman and [the California Supreme Court's decision in Brown v. Superior Court, 751 P.2d 470 (Cal. 1988),] in the development of modern American products liability law cannot be overstated. Together they represent a national rejection of the doctrine of strict manufacturer liability in tort by the very two courts that had led the products liability revolution during the 1960s and 1970s.").

pertained to the very lines of authority upon which it was relying.[15]

In addition to these two decisions, Azzarello referenced scholarly commentary, principally from Dean W. Page Keeton of the University of Texas and Dean Wade. Azzarello did not acknowledge, however, that both scholars strongly favored a negligence-based test for "strict" liability claims, albeit stripped of any scienter requirement. See Owen, Design Defects, 73 MO. L. REV. at 353-360 (summarizing the works of Deans Keeton and Wade before and after Azzarello).[16] Moreover, while highlighting selective portions of these scholars'

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[15] In terms of our sister states addressing the matter prior to Azzarello, New Jersey was not alone in recognizing the difficulty with underweighting the reasonableness dynamic in design-defect and warnings cases. See, e.g., Volkswagen of Am., Inc. v. Young, 321 A.2d 737, 747 (Md. 1974) ("Since the existence of a defective design depends upon the reasonableness of the manufacturer's action, and depends upon the degree of care which he has exercised, it is wholly illogical to speak of a defective design even though the manufacturer has 'exercised all possible care' in the preparation of his product."); accord Ford Motor Co. v. Hill, 404 So. 2d 1049, 1051 (Fla. 1981) (explaining that "analysis of whether a product is in a defective condition unreasonably dangerous to the user involves a negligence analysis in a 'design defect' case, unlike the analysis ordinarily required in a 'manufacturing flaw' situation").

[16] By omitting the scienter requirement, Deans Keeton and Wade were proposing that knowledge of the dangerous condition of a product be attributed to its manufacturer, regardless of whether the manufacturer knew or should have known of the danger. See id.; see also, e.g., Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. at 834-35). This adjustment aside, again, both scholars had strongly advocated a negligence-oriented scheme. See id.

work, Azzarello summarily rejected other critical aspects. For example, Dean Wade had forcefully argued that it was necessary to use terms such as "not reasonably safe" or "not duly safe" to convey essential liability principles to jurors. See Wade, Strict Tort Liability of Manufacturers, 19 S.W.L.J. at 15; Wade, On the Nature of Strict Tort Liability for Products, 44 MISS. L.J. at 833. See generally George W. Conk, Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?, 109 YALE L.J. 1087, 1088 (2000) ("The 'alternative-safer-design' rule enshrined in section 2 of the Restatement (Third) is the vindication of Wade's view that design-defect litigation should turn on whether the product could have and should have been made safer before it was sold."). Yet Azzarello pronounced, without further explanation, that those terms "merely obscure the underlying question and serve no real purpose." Azzarello, 480 Pa. at 556 n.9, 391 A.2d at 1025 n.9.

Similarly, early on, Dean William L. Prosser of the University of California-Berkeley, who was the reporter for Section 402A, observed that any analysis of a design defect rests "primarily upon a departure from proper standards of care," and that "the tort is essentially a matter of negligence" based upon a "duty to use reasonable care to design a product that is reasonably safe for its intended use, and for other uses which are foreseeably probable." W.L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 96 at 641, 644-45 (4th ed. 1971).

I mean no disrespect to the Justices who participated in Azzarello; in particular, I recognize the decision was well intentioned in following a

consumer-oriented direction set by prominent judicial decisions elsewhere. Nevertheless, in light of Azzarello's entrenched status, and the pitch of its defense by various jurists and members of the trial bar over the past thirty years, it is necessary to develop closely its substantial shortcomings in order to lay the groundwork for moving forward.

The reality is that Azzarello simply was not well reasoned in its own time, and it certainly has not withstood the test of time. Its good intentions alone cannot justify its continuing longevity, particularly in light of the wealth of experience and scholarship establishing the unworkability, going forward, of its dictates as common-law tort principles. See generally Mayhugh v. Coon, 460 Pa. 128, 135-36, 331 A.2d 452, 456 (1975) (discussing exceptions to stare decisis). As noted, the very same jurisdictions upon which Azzarello relied very quickly had recognized that the interests of justice required necessary and substantial adjustments to the experiment with strict liability across the categories of manufacturing, design, and warning defects. This Court has lagged for far too long in this essential recognition, and unfortunately, the ritualistic adherence to Azzarello has substantially impeded the progress of our product liability jurisprudence. See generally 1 MADDEN & OWEN ON PROD. LIAB. § 5:10 (explaining that "the rhetoric of 'strictness' proved so potent and uncompromising that it hampered the reasoned evolution of doctrine over time.").

As Appellee notes, this Court had supplemented Azzarello's loss-spreading reasoning with a deterrence-based rationale. See Kimco, 536

Pa. at 9, 637 A.2d at 607 (positing that the "deterrent effect of imposing strict product liability standards would be weakened were we to allow actions based upon it to be defeated, or recoveries reduced by negligence concepts. We will not countenance such a development."). Like the loss-spreading rationale, however, the deterrence-based rationale is stated in too conclusory terms, and is too powerful, to be deemed controlling. Courts are not experts in manufacturer behavior, and there are equally reasonable arguments to be made that a negligence-based standard does more to encourage safer products than an absolute liability scheme. See, e.g., Prentis, 365 N.W.2d at 185. Moreover, courts and commentators have noted that these types of unsupported social policy judgments can have tremendous social consequences. As explained by one commentator:

> [C]hallenging a product's design challenges the decision of the manufacturer's engineers and managers to develop and sell a product containing a particular type and level of danger. Thus, unlike a manufacturing defect claim, which implicates merely a single product unit, a design defect claim challenges the integrity of the entire product line and so pierces to the very core of the manufacturer's enterprise. For this reason, design defect claims are of greatest concern to manufacturers, since a judicial declaration that the design of a particular product is "defective" condemns the entire product line.

See Owens, Design Defects, 73 MO. L. REV. at 296; see also Prentis, 365 N.W.2d at 185 (explaining that "a verdict for the plaintiff in a design defect case is the equivalent of a determination that an entire product line is defective. It usually will involve a significant portion of the manufacturer's assets and the public may be deprived of a product.").[17] In order to prevent the common law from unduly disrupting product investment and innovation,[18] rational limits are necessary, which provides one substantial explanation for most courts' retreat from more absolute forms of liability grounded on loss-spreading and deterrence-based reasoning in design and warnings cases, in favor of a return to more traditional tort theories. Accord Worthington, The "Citadel" Revisited, 36 S. TEX. L. REV. at 269 (commenting that "courts are beginning to place

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[17] Notably, Azzarello and Kimco gave no express consideration to such potential effects.

[18] Touching on this subject of chilling product development, in the context of a warnings case, the California Supreme Court stated as follows:

> [We have] refused to extend strict liability to the failure to warn of risks that were unknowable at the time of distribution. . . [I]f a manufacturer could not count on limiting its liability to risks that were known or knowable at the time of manufacture or distribution, it would be discouraged from developing new and improved products for fear that later significant advances in scientific knowledge would increase its liability.

Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 556 (Cal. 1991).

limits on existing non-fault based theories, representing both a return to traditional moral principles and a pragmatic realization of the chilling effect of the strict tort liability doctrine."). See generally Toogood v. Rogal, 573 Pa. 245, 254, 824 A.2d 1140, 1145 (2003) (describing fault-based liability as a "traditional cornerstone" of tort law).

There is some force to Appellee's argument that, at this juncture, this Court should leave alterations to the existing product liability scheme to the General Assembly. Certainly, statutory law now occupies the field of a vast array of substantive matters, and this Court's common-law decision-making role has been substantially curtailed. Moreover, in the face of complex technological and industrial developments, modern products liability law contains many components that are interlocking, interdependent, and/or overlapping, suggesting against the sort of piecemeal development that is inherent in the progression of the common law.[19]

Nevertheless, to date, the Legislature has not occupied this particular arena; it is in a state of substantial disrepair occasioned by longstanding adherence to Azzarello and its progeny; and this

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[19] Our common-law decisions are grounded in records of individual cases and the advocacy by the parties shaped by those records. Unlike the legislative process, the adjudicatory process is structured to cast a narrow focus on matters framed by litigants before the Court in a highly directed fashion. The broader tools available to the legislative branch in making social policy judgments, including the availability of comprehensive investigations, are discussed in Pegram v. Herdrich, 530 U.S. 211, 221-22, 120 S. Ct. 2143, 2150 (2000).

path has taken our jurisprudence too far from the legitimate home of tort law in the concept of corrective justice. Thus, I believe the Court should make necessary adjustments while the possibility of comprehensive legislative treatment remains uncertain. Cf. Hack v. Hack, 495 Pa. 300, 316, 433 A.2d 859, 867 (1981) ("This Court has full authority, and the corresponding duty, to examine its precedents to assure that a rule previously developed is not perpetuated when the reason for the rule no longer exists and when application of the rule would cause injustice.").

In summary, the Court should no longer say negligence concepts have no place in "strict-liability" doctrine in Pennsylvania, when this simply is not accurate in our tort scheme, or in any scheme purporting to recognize that manufacturers and distributors are not outright insurers for all harm involving their products. To the degree a distinct category of "strict" product liability doctrine is necessary, at most, it always has been, and rationally should be, one of quasi-strict liability, tempered, in design and warning cases, with the legitimate involvement of notions of foreseeability and reasonableness within the purview of the fact finder.[20]

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[20] I would credit the late, Honorable Donald E. Wieand with making an extensive case, in 1987, for adopting a standard for design cases grounded in negligence concepts, consistent with my position here. See Foley v. Clark Equipment Co., 361 Pa. Super. 599, 612-26, 523 A.2d 379, 385-92 (1987).

B. A Replacement Scheme

As highlighted in DGS and above, the powerful no-negligence-in-strict-liability rubric has undergirded numerous Pennsylvania decisions in the product liability arena over the last thirty years. See DGS, 587 Pa. at 259, 898 A.2d at 604. Thus, at the risk of understatement, a present disapproval of this premise would open a substantial void. This appeal was accepted for review to evaluate both whether that void should be opened, and, if so, whether Section 2 of the Third Restatement should be adopted outright to fill at least a portion of it.

1. The Third Restatement

I am on record as favoring prospective movement to the Third Restatement position, and I remain of that position today, for the reasons I previously have stated. See Phillips, 576 Pa. at 664-82, 841 A.2d at 1012-23. I believe the Third Restatement's provisions are far more reasoned and balanced than Azzarello, and adoption would represent a substantial advancement in Pennsylvania law. While Appellee is correct that we should not cede our decision making authority to commentators, the reality is that necessary modernization of the law of Pennsylvania has been suppressed for so long by the no-negligence-in-strict-liability mantra that we are essentially thirty years behind. The Restatement would serve as a far more rational platform from which to make modest future adjustments, if necessary, than Azzarello. As stated very recently by a panel of the United States Court of Appeals for the Third Circuit in conjunction with a prediction that this Court would adopt Sections 1

and 2 of the Third Restatement: "The Third Restatement . . . eliminates much of the confusion that has resulted from attempting to quarantine negligence concepts and insulate them from strict liability claims." Berrier v. Simplicity Mfg., Inc., 563 F.3d 38, 55 (3d Cir. 2009). Thus, the Restatement provides a suitable template for making up for lost time and moving forward.

2. A Common-Law Lawmaking Alternative

To the degree a majority of the Court is not comfortable adopting the whole of Section 2 in this case,[21] there are other alternatives to leaving Azzarello in place while the Court continues to search for the perfect vehicle in which to devise a replacement scheme. For example, the Court could at least depart from Azzarello prospectively, thus clearing a path for our common pleas and intermediate appellate courts to consider the reasoned recommendations of the Third Restatement, as well as other reasoned alternatives and/or refinements. As the cases would move through the system, this Court inevitably would

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[21] The present matter is a warnings case. Thus, it would be unusual for this appeal to be employed as a vehicle to adopt a core aspect of Section 2 of the Third Restatement -- the requirement of a reasonable alternative design pertaining to design-defect claims. See Restatement (Third) of Torts: Products Liability § 2(b). My personal position is that design matters were at issue in Phillips, and this case represents a necessary extension of the debate which initially crystallized there. I recognize, however, that other Justices (particularly those who did not participate in Phillips) may hold a different view; thus, I have included the discussion, infra and in Appendix A, of a more modest common-law lawmaking alternative.

make selections to fill the void created by Azzarello's long tenure.[22]

Undoubtedly, this approach would not be wholly satisfying to those who have long pursued a modernization of this Court's product-liability jurisprudence. It may well be, however, that the forum for timely, comprehensive solutions is with the political branch, which possesses the broader tools necessary to make better informed social policy decisions balancing the strong, competing interests involved in the product liability arena.[23]

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[22] The process of developing and refining applicable duties and liabilities as a matter of common law is generally slow and cumbersome. Our trial courts, as courts of general jurisdiction, are responsible for addressing open issues in the first instance, and cases filter through the intermediate appellate courts, with review being granted by this Court on a discretionary basis, such that the opportunity is provided for careful, informed developments. In this process, the dynamics of a seven-member Court cannot be understated -- at times, it is difficult enough to achieve a consensus on a single, narrow question presented.

[23] Of course, even if the General Assembly were to act, this Court would maintain a substantial role in assuring conformity with constitutional limitations, and interpreting or construing the legislative will. Additionally, and unfortunately, in past instances of major social policy legislation, the Legislature has sometimes left substantial decision-making details to others (be it the judiciary or administrative agencies), making it very difficult for the courts to assess what was intended. See, e.g., Generette v. Donegal Mut. Ins. Co., 598 Pa. 505, 523, n.15, 957 A.2d 1180, 1191 n.15 (2008) (commenting on such gaps in the Motor Vehicle Financial Responsibility Law). In such instances, in filling major policy-setting gaps based on only generalized information about the legislative intent, the courts are vulnerable to being perceived as effectively reverting to a common-law decision-making role in any event. Thus, if there ultimately is a legislative solution, a clear and comprehensive one is most desirable.

If the Court were to pursue the common-law lawmaking alterative, it could initially reaffirm the understanding, as succinctly expressed by one commentator, that "[m]odern products liability law rests fundamentally on the premise that manufacturers are fairly held to answer in the courts for the basic safety of their products' designs." Owen, Design Defects, 73 MO. L. REV. at 291. Since the difficulties described above are with Azzarello and not Section 402A itself, Pennsylvania would remain a Section 402A jurisdiction.[24] The disapproval of Azzarello's no-negligence-in-strict-liability approach, however, should yield at least the non-exclusive set of consequences and considerations set forth in the addendum attached to this opinion as Appendix A.

III. Prospective Application

The Phillips concurrence advocated making the foundational movement away from Section 402A on a purely prospective basis. See Phillips, 576 Pa. at 665, 841 A.2d at 1012 (Saylor, J., concurring). Although this Court generally applies the law in effect at the time of an appellate decision, affording parties whose cases are pending the benefit of changes in the law, see Blackwell v. Commonwealth, State Ethics Comm'n, 527 Pa. 172, 182, 589 A.2d 1094, 1099 (1991), it may deviate from this approach to further the interests of justice. See id. at 185, 589 A.2d at 1100 ("The prime impetus behind th[e]

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[24] This is not to say that the Court would be rejecting principles arising out of the Third Restatement that are consistent with the application of Section 402A, or that it would not adopt aspects of the Third Restatement as they are presented to it in the context of concrete cases.

occasional willingness not to give a decision full effect is the concern that a novel decision will unfairly prejudice those formerly advantaged by the old rules." (quoting Gibson v. Commonwealth, 490 Pa. 156, 163, 415 A.2d 80, 84 (1980))).[25] Here, a

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25 More specifically, the standard adopted by this Court considers: whether the decision establishes a new principle of law; the merits by reviewing the history of the rule in question, its purpose and effect, and the potential impact of retroactive effect on its application; and the equities involved. See Blackwell, 527 Pa. at 184, 589 A.2d at 1100 (citing Chevron Oil Co. v. Hudson, 404 U.S. 97, 106-07, 92 S. Ct. 349, 355 (1971), overruled in part by Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 113 S. Ct. 2510 (1993)).

I recognize this Court has indicated that the Harper decision modifying Chevron "strengthens the general principle that changes in law are to be applied retroactively to pending cases." Christy v. Cranberry Volunteer Ambulance Corps, Inc., 579 Pa. 404, 419, 856 A.2d 43, 52 (2004). Nevertheless, this Court subsequently applied the Chevron factors to support a purely prospective application of a judicial decision in Oz Gas, Ltd. v. Warren Area Sch. Dist., 595 Pa. 128, 142-43, 938 A.2d 274, 283-84 (2007). While Oz Gas entailed prospective application of decision interpreting a tax statute, I believe it illustrates that, although the instances in which purely prospective application of a judicial decision is warranted may be rare, the Chevron approach does maintain some independent viability in permitting prospective application of decisions involving matters of Pennsylvania law on the civil side.

It is also worth noting that Harper's primary concern was with the disparate impact of applying a judicial decision to the parties before the Court but not to similarly situated persons with preserved claims pending on direct appeal. See Harper, 509 U.S. at 97- 98, 113 S. Ct. at 2517-18. The Phillips concurrence, however, proposed prospective application that would not extend to the parties before the Court. Moreover, it seems to me that there can be as much or more justice in directing purely prospective application of a decision overruling a longstanding, entrenched common-law doctrine impacting on

predominant consideration is the settled expectations of those with accrued causes of action and a present entitlement to resort to the civil justice system. Azzarello has been with us for too long, and too much settled jurisprudence has evolved around it, for it to be retroactively displaced without profound impact on vested entitlements. Cf. American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 200, 110 S. Ct. 2323, 2342-43 (1990) ("The utility of our retroactivity doctrine in cushioning the sometimes inequitable and disruptive effects of law-changing decisions is clear."). Certainly, substantial constitutional challenges would be presented to any

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vested rights as a decision resolving tax matters where the parties were forewarned that there are unsettled legal questions.

Much of the debate over the courts' ability to make law prospectively centers on the notion that courts do not actually make the law, but rather, declare what the law is. See Smith, 496 U.S. at 201, 110 S. Ct. at 2343 (Scalia, J., concurring) ("[P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be."). This simply is not true, however, of state common-law decision making -- this Court made new law in Azzarello, and it will have to make new law again if it is to address Azzarello's shortcomings.

The Legislature makes new law prospectively, as a general rule, for very good reasons -- I believe it would be poor policy to absolutely foreclose the courts from doing the same in the common-law lawmaking setting, where the interests of justice favor the approach and the constitution does not forbid it. Although it may be the rare instance in which purely prospective application is warranted, the present circumstances are, in my view, compelling and essentially sui generis.

retroactive abrogation by the Legislature.[26] Given the unique circumstances including the scale of the affected interests, I was reluctant to attempt, in Phillips, as a matter of common-law decision making, what our precedent suggests may be forbidden of the political branch. At least in the absence of a preserved constitutional claim asserted by a defendant or defendants, I felt that any overruling of Azzarello should be purely prospective.[27, 28]

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[26] See PA. CONST. art.1, §11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial, or delay."). See generally Ieropoli v. AC&S Corp., 577 Pa. 138, 155-56, 842 A.2d 919, 930 (2004) (explaining that "a cause of action that has accrued . . . is a vested right, which under Article 1, Section 11, may not be eliminated by subsequent legislation"); see also Gibson, 490 Pa. at 161, 415 A.2d at 83.

[27] In this regard, I would emphasize the requirement of a preserved claim. Thus, for example, if a defendant seeks to assert a claim that its constitutional right to a jury trial was impaired by Azzarello's relegation of the unreasonably-dangerous requirement to a judge on facts most favorable to the plaintiff, such defendant must point to where in the record such claim was preserved. See Pa.R.A.P. 2119(e). Moreover, any favorable ruling on the constitutional claim would apply in other cases only to defendants who also had preserved the constitutional claim. See Commonwealth v. Cabeza, 503 Pa. 228, 232, 469 A.2d 146, 148 (1983) (explaining that, in both civil and criminal matters, in order for a new rule of law to apply retroactively to a case pending on direct appeal, the issue had to be preserved at "all stages of adjudication up to and including any direct appeal").

[28] Of course, the above calculus may change as Azzarello continues to ripen, and more and more litigants are affected by its shortcomings.

Appellee argues that the outcome of this case would not be affected by a movement by this Court to the Third Restatement. See Brief for Appellee at 8-16.[29]

This argument is obviously a potential basis supporting the present dismissal. Notably, however, a prospective application of the proposed change in the common law mitigates the concern regarding case-specific application in any event. This is so, because, under a purely prospective approach, the change in the common law would not have an impact on the outcome of any discrete case in which it would occur. Accordingly -- and in view of the extensive and vigorous advocacy presented, the persistent difficulties occasioned by the Phillips divide, and underlying shortcomings in our present law -- I believe this Court should act now to confront Azzarello in light of thirty years of developed understanding and experience.

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[29] Appellant's arguments, as framed in its initial brief, integrally incorporate the position that the Third Restatement would relieve downstream suppliers, such as Appellant, of liability premised on the liability of upstream entities, such as the manufacturer. Appellee, however, develops that Section 2 is consistent with prevailing Pennsylvania law in imposing strict or vicarious liability on non-manufacturer distributors or suppliers. See Restatement (Third) of Torts: Products Liability § 2, cmt. o. Therefore, and as Appellant in its initial brief conceded the material elements of liability on the part of the manufacturing interests, see Brief for Appellant at 19-20, Appellee contends that application of the Third Restatement would not make a material difference to the outcome of this appeal.

IV. Conclusion

In summary, in light of the clear deficiencies of Azzarello in the realm of modern products liability jurisprudence, I would overrule the decision prospectively and adopt Sections 1 and 2 of the Third Restatement in its stead, applicable to causes of action accruing after the effective date of the opinion. At the very least, I believe the Court should disavow Azzarello now to permit the modernization of Pennsylvania's products liability jurisprudence to progress at long last.

Mr. Chief Justice Castille joins this dissenting statement.

APPENDIX A

Non-exclusive consequences and considerations resulting from an overruling of Azzerello without simultaneously adopting a replacement scheme

A. The Intended Use Doctrine

In Phillips, this Court adopted a very narrow approach to the intended-use doctrine, based on a combination of two Justices' application of the no-negligence-instrict- liability rationale, see Phillips, 576 Pa. at 656-57, 841 A.2d at 1007, and three Justices' concern with the expansion of a doctrine based on that rationale, see Phillips, 576 Pa at 674-75, 841 A.2d at 1018-19 (Saylor, J., concurring). With the demise of these underpinnings, the Court's recognition in DGS of the rationality of subsuming within the intended-use doctrine all reasonably foreseeable uses or occurrences, see DGS, 587 Pa. at 257, 898 A.2d at 603, could be realized. This, in fact, appears to be a substantial thrust of the Third Circuit's very recent Berrier decision. See Berrier, 563 F.3d at 53-58;[1] accord Cepeda, 386 A.2d at 828 ("It is . . . clear that many, if not most jurisdictions now acknowledge that in applying strict liability in tort for design defects manufacturers cannot escape liability on grounds of misuse or abnormal use if the actual use proximate to the injury was objectively foreseeable." (citations omitted)).

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[1] Although Berrier's prediction that this Court would adopt Sections 1 and 2 of the Third Restatement still may prove correct, if my position were to be adopted, it would disprove the federal court's implicit prediction that the Court would apply those sections retroactively.

B. Manufacturing, Design, and Warnings Defects

I would reaffirm that the differential treatment as between manufacturing, design, and warning scenarios is consistent with Section 402A.[2] Proof of negligence is dispensed with by most courts in applying Section 402A or similar principles in the manufacturing defect scenario, see Richard W. Wright, The Principles of Product Liability, 26 REV. LITIG. 1067, 1073 (2007), while design and warnings claims are centered on some combination of the overlapping considerations of unreasonable dangerousness, due and reasonable safety, risk-utility balancing, and/or consumer expectations. See, e.g., Barker, 573 P.2d at 457.[3]

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[2] See generally 1 MADDEN & OWEN ON PRODUCTS LIABILITY §5:11 ("Today, most courts and commentators accept as axiomatic the fundamental distinctions between three very different forms of product defect: (1) manufacturing flaws, (2) design inadequacies, and (3) insufficient warnings of danger and instructions on safe use. Over the decades since section 402A was adopted by the ALI, the need to develop different doctrinal approaches to the problems in these three very different contexts has become a well-accepted premise of products liability law.").

[3] Courts and commentators have frequently commented that product-liability warnings claims most quintessentially incorporate negligence principles. See, e.g., Smith v. Walter C. Best, Inc., 927 F.2d 736, 741-42 (3d Cir. 1990) (referencing the conclusion of Deans Prosser and Keeton, that "[a]lthough [strict liability for failure to warn] is sometimes referred to as strict liability, it really is nothing more than a ground of negligence liability" (citing W.L. PROSSER AND W.L. KEETON, TORTS § 99, at 697 (5th ed. 1984))); 1 MADDEN & OWEN ON PRODUCTS LIABILITY § 2:10 ("Courts have most forthrightly admitted the central role of negligence principles in 'strict' liability claims in the context of the duty to warn.").

C. Product and Conduct

As previously noted, the courts' attempts to distinguish product from conduct in design and warning cases have been problematic. Since the object of the distinction is to preserve an uncompromising boundary between negligence and strict liability, see Azzarello, 480 Pa. at 555-56, 391 A.2d at 1025-26, the justification for maintaining the difference would carry less force if such boundary were removed. Nevertheless, there are arguments to be made that, although Azzarello would be no more, strict liability for design-defect claims, like manufacturing-defect ones, should maintain some evidentiary advantage for plaintiffs, perhaps along the line of the Wade-Keeton test. See supra (main text) note 16.[4] On a similar score, Appellee's amicus, United Steelworkers, presents the following argument refuting the Phillips concurrence's acceptance of the notion that product design and conduct (the design process) should be treated as one in the same, in design cases, for purposes of the liability determination:

> It is perhaps true that usually an unreasonably dangerous design will result from unreasonable conduct on the part of the designer. However, to state this relationship as being inescapable is to ignore the scenario in

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[4] Notably, the Third Restatement does provide for an inference that harm sustained by the plaintiff was caused by a product defect where the incident was of a kind that ordinarily occurs as a result of product defect and was not solely the result of another cause. See Restatement (Third) § 3.

which a designer might be excusably unaware of the circumstances that make a product dangerous, but nonetheless allowed the dangers to exist in the product. Furthermore, the passage of time attendant to many products liability cases means that evidence cannot be obtained through normal discovery procedures, and therefore evidentiary standards preclude even an inexcusably unaware designer from being found liable for defects. The rule embodied in 402A therefore imposes a standard that allows a product to be considered defective in a situation where a product would have been altered or withdrawn from the market if only the designer had known of its dangerous propensities.

* * *

It is inevitable that cases will arise involving defective products that have caused an injury, but where no fault can be proved on the part of a defendant. Such cases highlight the need for a regime which properly places the risk of lost evidence on the part of the party in the best position to both realize the utility of the product (through the prices of the products and the income generated thereby) and to know of the product[']s dangerous

> propensities. The manufacturer and seller have more reason to know of dangers than the consumer, whose primary sources of information on the product are manufacturers and sellers. For these reasons, strict liability embodied in 402A is the optimal regime and should be retained.

Brief of Amicus United Steelworkers at 10-11.

It appears that a fair number, if not most, courts considering the unknowable danger paradigm have refused to allocate the risk of loss to the manufacturer, based upon the conclusion that doing so would render the manufacturer an insurer. Cf. Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 559 (Cal. 1991) (authorizing the admission of state-of-the-art evidence in product liability warnings cases).[5] Nevertheless, the Court could reserve decision on the matter for an appropriate case, upon more targeted advocacy by the parties at large.

D. Judge and Jury

The overruling of Azzarello would place the "unreasonable dangerousness" factor, in one form or another, back into the fact finder's

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[5] See generally Owen, Design Defects, 73 MO. L. REV. at 360 ("The ghost of the Wade-Keeton test continues to haunt judicial halls, but its time has come and gone."); Leibowitz v. Ortho Pharmaceutical Corp., 224 Pa. Super. 418, 433, 307 A.2d 449, 458 (1973) (positing that holding manufacturers liable for unknowable dangers would make them insurers).

calculus,[6] and our trial judges' function of risk-utility balancing on facts most favorable to the plaintiff would be limited to the ordinary determination of whether there are material facts in issue for submission to a jury. Accord Owen, Design Defects, 73 MO. L. REV. at 332 ("The cost-benefit approach for evaluating proposed alternative designs may be logical and straightforward, but the actual process of balancing the variety of intangible considerations involved in safety, cost, and utility trade-offs involves a complex conceptual balance which is as much political as it is 'factual.' Accordingly, the risk-utility balance determination, assuming the plaintiff has offered credible evidence for an alternative balance, almost always raises an issue of fact for jury determination.").

E. Risk-Utility and Consumer Expectations

The difficult issue of giving appropriate content to the interrelated concepts of "unreasonable dangerousness" and "defect" remains. The central problem with Azzarello is that it removed the former from the fact-finder's purview entirely and gave insufficient content to the latter.

The two primary vehicles for adding the necessary content are the consumer expectations

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[6] Although it is not universally accepted, there are fair arguments to be made in favor of Dean Wade's preference for the "due or reasonable safety" formulation in a jury charge. See, e.g., Suter, 406 A.2d at 153. Overruling Azzarello would overturn its summary rejection of such alternative formulations.

test and risk-utility balancing.[7] A wealth of diverse judicial opinions and commentary are devoted to discussing the role of risk-utility balancing and consumer expectations in design-defect cases. See, e.g., Owen, Design Defects, 73 MO. L. REV. at 300-21. In Pennsylvania, at least under suggested jury instructions, the fact finder would learn of neither, but rather, would be advised, per Azzarello, that "[t]he product must be provided with every element necessary to make it safe for its intended use, and without any condition that makes it unsafe for its intended use." PBI, PA. SUGGESTED STANDARD JURY INSTRUCTIONS § 8.02 (3d ed. 2005). A present determination that such instruction is insufficient would open the way for a full inquiry into the appropriate roles for risk-utility balancing and consumer expectations in directing the fact

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[7] The consumer expectations test as such was derived from Comment i to Section 402A. See Restatement Second § 402A, cmt. i ("The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."). Some commentators have noted that comment i appears to focus on the consumption of food and drug products. See David G. Owen, The Puzzle of Comments, 55 HASTINGS L.J. 1377, 1382 (2004) ("A close reading of comments i, j, and k to the Restatement (Second) of Torts section 402A, together with their 'legislative history,' reveals that these comments were directed exclusively to a narrow set of issues pertinent to a limited class of products, to wit, the liability (and limits of liability) of sellers of certain types of products -- food, whiskey, cigarettes, drugs, and similar products that carry unavoidable dangers."). Comment i, however, also is read much more broadly by various courts and commentators. See generally Lester v. Magic Chef, Inc., 641 P.2d 353, 359 (Kan. 1982) (observing that "[v]olumes have been written about the language of Comment i to § 402A").

finder. Thus, we would have essentially come to the place in the inquiry where other courts stood in the late 1970s.

The present baseline in Pennsylvania is risk-utility balancing. This much was accepted by Azzarello, although its attempt to relegate the task to the trial judge on facts most favorable to one party was misguided. Most courts recognize that consumer expectations also should play a role, but early attempts to afford it a predominant one were generally unsuccessful, and the remaining debate generally is between a relatively limited role as part of the consumer expectations test, see, e.g., Restatement (Third) of Torts: Products Liability §2, cmt. h, and a more significant role as a broader inquiry, more independent of risk-utility balancing. See, e.g., Mikolajczyk v. Ford Motor Co., 901 N.E.2d 329, 352-53 (Ill. 2008); Soule v. General Motors Corp., 882 P.2d 298, 305-08 (Cal. 1994) (reasoning that, under California law, plaintiffs may recover if they establish a product either falls below consumer expectation as to safety or, if it meets ordinary consumer expectations, the fact-finder determines the product's design yields excessive preventable danger) [8] See generally Owen, Design Defects, 73 MO. L. REV. at 352-53 ("As cost-benefit analysis gathers strength around the globe as the dominant method for judging whether a product's design is adequately safe, courts and legislatures continue to search for ways to accommodate consumer

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[8] Soule appears to have effected a dilution in California's consumer expectation test, as discussed in Todd v. Societe Bic, S.A., 21 F.3d 1402, 1409 (7th Cir. 1994).

expectations without banishing it altogether from design defect determinations."). The appropriate juxtaposition of riskutility balancing and consumer expectations in design cases would be an issue which would need to be resolved, in Pennsylvania, as a matter of common-law decision-making.

In terms of the risk-utility balancing aspect, some adjustments would need to be made to the Wade factors commonly applied in design cases. See generally Owen, 73 MO. L. REV. at 321 (observing that "modern courts rarely do little more than pay lip service to the Wade factors, which are now well past their prime"). The object is obviously to capture the dynamics of reasonable design considerations in a fashion that is accessible to lay jurors, yet as succinct as possible. The common-law process would also determine the appropriate focus of risk-utility balancing by a fact-finder, which the Third Restatement and numerous commentators, at least, would center on a concomitant requirement of proof of a reasonable, alternative design. See, e.g., id. at 327 ("Although the risk-utility issue in design defect cases is frequently framed vaguely in terms of a balance between the risks and benefits of the 'product,' the true costbenefit issue litigated in almost every case is much narrower -- whether the safety benefits of altering the product's design in a particular manner would foreseeably have exceeded the cost of the alteration. Risk-utility analysis is focused, in other words, on the costs and benefits of the specific alternative design feature proposed by

the plaintiff.").[9] Again, there are numerous models available to our common pleas judges, which would be charged with the first-level, common-law selection decisions in a post- Azzarello era.

F. Principles Constructed from Azzarello

Another clear consequence of a decision overruling Azzarello is that other subsidiary principles resting on the no-negligence-in-strict-liability premise should be open for fresh review. Two that come readily to mind are the Pennsylvania courts' rejection of the comparative negligence principles and the state-of-the-art defense in design cases, both of which rest, essentially, on Azzarello. See Kimco, 536 Pa. at 7, 637 A.2d at 605-06 (comparative negligence); Carrecter, 346 Pa. Super. at 103, 499 A.2d at 330-31 (state of the art); cf. Lewis, 515 Pa. at 343, 528 A.2d at 594 (industry

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[9] Dean Wade's reluctance to put a full panoply of risk-utility factors before lay jurors may well be justified, but the reality is that, in design cases, jurors will be charged with the duty to make an informed evaluation concerning design reasonableness, and the trial courts will be responsible to provide the jurors sufficient guidance to accomplish this task. Cf. George W. Conk, Compared to What? Instructing the Jury on Product Defect under the Products Liability Act and the Restatement (Third) of Torts, 30 SETON HALL L. REV. 273, 277 (1999) (positing that "[t]he quality of decisions will be better served if jury instructions invite the presentation of evidence and spur arguments that evoke the full vibrancy of the moment of design for the jury (and the court it assists). The clamor of the competing considerations in the good and prudent designer's mind should be heard in the courtroom and in the jury room.").

standards)[10] Again, I would not decide these matters here in the absence of material relevance and focused advocacy; I merely note that, shorn of their groundings in Azzerello's rationale, such matters should be revisited. The principles could be reaffirmed if there is other persuasive rationale to support them.

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[10] These rulings appear to work against the modern trend in other jurisdictions. See, e.g., Webb v. Navistar Int'l Transp. Corp., 692 A.2d 343, 348 (Vt. 1996) ("Most courts reject the framework that places the burden of loss on one party where two parties contributed to causing the injury."); AM. L. PROD. LIAB. 3d § 40:37 (2008) ("Most jurisdictions that have adopted the doctrine of comparative negligence or fault apply comparative fault principles to strict liability actions.").

[FILED: May 18, 2009]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3621

WAYNE BERRIER; BRENDA GREGG, in their own right and as parents and natural guardians of Ashley Berrier, a minor,

Appellants

v.

SIMPLICITY MANUFACTURING, INC.,

Third-Party Plaintiff

v.

SUSIE SHOFF;
MELVIN SHOFF,

Third-Party Defendants

SUR PETITION FOR REHEARING EN BANC

BEFORE: SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES,

SMITH, FISHER, CHAGARES, JORDAN,
HARDIMAN Circuit Judges

The petition for rehearing on behalf of Appellee in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing en banc is hereby **DENIED.**

By the Court,

/s/ Theodore A. McKee
Circuit Judge

DATED: 18 May 2009

[FILED: July 6, 2009]

1 of 1 DOCUMENT

PENNSYLVANIA RULES OF THE COURT, ANNOTATED BY LEXISNEXIS (R)

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INTERNAL OPERATING PROCEDURES OF THE SUPREME COURT

Pa. Sup. Ct. Internal Operating Proc. 10 (2009)

Rule 10. Certification of questions of law

A. Court limitation. This Court will accept Certification Petitions from any of the following courts:

1. The United States Supreme Court; or

2. United States Courts of Appeal.

B. Standards. Like granting allocatur, acceptance of certification is a matter of judicial discretion. This Court may accept certification of a question of Pennsylvania law only where there are special and important reasons therefor, including, but not limited to, any of the following:

1. The question of law is one of first impression and is of such substantial public importance as to require prompt and definitive resolution by this Court;

2. The question of law is one with respect to which there are conflicting decisions in other courts; or

3. The question of law concerns an unsettled issue of the constitutionality, construction, or application of a statute of this Commonwealth.

4. This Court shall not accept certification unless all facts material to the question of law to be determined are undisputed, and the question of law is one that the petitioning court has not previously decided.

5. This Court shall decide whether to accept or refuse certification without hearing oral argument.

C. Assignment and disposition. The prothonotary shall refer Certification Petitions to the Chief Justice. The Chief Justice will prepare memoranda setting forth the positions of the parties and a recommended disposition. Vote proposals shall be circulated within thirty days from the date of assignment, and shall contain a proposed disposition date no greater than thirty days from the date of circulation. A vote of the majority of those participating is required to implement the proposed disposition.

Every Certification Petition shall be decided within sixty days. Orders disposing of Certification Petitions shall include the names of any justices who did not participate in the consideration or decision of the matter.

Upon acceptance of certification, the prothonotary shall:

1. Issue an order accepting certification, which shall specify the questions of law for which certification was accepted, and whether the case is to be submitted on briefs or designated by the Court to be heard at the argument session;

2. Establish a briefing schedule;

3. If oral argument is granted, list the matter for oral argument; and

4. Take such further action as this Court directs.

D. Reconsideration. A vote of the majority is required to grant reconsideration.

[FILED: July 31, 2009]

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT MISCELLANEOUS--
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Review Court Orders which may amend this Rule.

§ 110.0 Certification of Questions of State Law

110.1 Certification of Questions of State Law

When the procedures of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the procedures of that court, and will stay the case in this court to

await the state court's decision whether to accept the question certified. The certification will be made after the briefs are filed in this court. A motion for certification must be included in the moving party's brief.

(3)

No. 09-201

Supreme Court, U.S.
FILED
OCT 6 - 2009
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In The
Supreme Court of the United States

SIMPLICITY MANUFACTURING, INC.,
Petitioner,

v.

WAYNE BERRIER ET UX.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION AND SUPPLEMENTAL BRIEF FOR WRIT OF CERTIORARI

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(E.D. Pa. September 9, 2009) 3

Richetta v. Stanley Fastening Systems,
No. 07-CV-3814, 2009 WL 2707549
(E.D. Pa. August 25, 2009) 3

ARGUMENT

Minor plaintiff Ashley Berrier and her parents, respondents herein, submit this Brief in Opposition to a Petition and Supplemental Brief for Writ of Certiorari filed by Simplicity Manufacturing, Inc. Following review of the original Petition, the Berrier respondents decided that they would not file a brief in opposition, and accordingly submitted a waiver form on September 11, 2009. Thereafter, a Supplemental Brief was received from Simplicity on October 2, 2009. While the Berrier respondents continue to believe a formal response to the Petition for Writ of Certiorari is unnecessary, the Supplemental Brief warrants some reply. The waiver was withdrawn on October 5 so that this Brief in Opposition to a grant of certiorari could be filed.

Certiorari is generally appropriate to resolve a conflict within the federal circuit courts, to resolve a conflict between the federal circuit courts and a state supreme court, or to decide an important question of federal law. The Petition for Writ of Certiorari and Supplemental Brief from petitioner Simplicity confirms that none of these circumstances is present here. On the contrary, this case involves a situation in which a federal circuit court (the Third Circuit Court of Appeals) was obligated to predict how a state supreme court (the Pennsylvania Supreme Court) would decide an issue it had not expressly addressed before. While the state supreme court allowed discretionary review of another case (the Bugosh case) which would have permitted it to embrace (or reject) the prediction of the federal circuit court, the state supreme court ultimately

elected not to decide the merits of the appeal, and instead dismissed the case on grounds that discretionary review should not have been allowed in the first place. Simplicity has now filed a supplemental brief to advise that since the procedural dismissal by the state supreme court, two district courts have divided on whether the federal circuit court's prediction remains authoritative in light of the state supreme court's non-decision.

No issue of federal law is presented by these circumstances. It is not disputed that the Third Circuit Court of Appeals had not only the right, but the duty, to predict Pennsylvania law in an area where the Pennsylvania Supreme Court had not clearly spoken.[1] The fact that there is some hiatus between the time of a federal circuit court's prediction of state law, and the state supreme court's consideration of the issue is, of course, both inevitable and unavoidable. The additional fact that there are intervening federal district court cases which may consider the accuracy of the circuit court's prediction, pending resolution of the issue by the state supreme court, is similarly a common occurrence. That the Berrier case once again

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[1] Indeed, the issue upon which the Third Circuit made its prediction, i.e., whether "bystanders" would be protected under Pennsylvania's product liability law, was the subject of a certified question by the Third Circuit to the Pennsylvania Supreme Court more than one year before the Berrier opinion was issued. However, in a one-sentence order issued 9 months after receipt of the certified question, the Supreme Court declined to answer the certified question, leaving the Third Circuit with no choice but to decide the case by predicting the probable direction of Pennsylvania law.

presents this familiar scenario - in which a circuit court's prediction must await validation until the issue at hand is decided by the state supreme court - is not a matter which could or should provoke review by the Supreme Court.

Nor do the two opinions from the United States District Court for the Eastern District of Pennsylvania, attached to Simplicity's supplemental brief, support the Petition for Writ of Certiorari. In Richetta v. Stanley Fastening Systems, No. 07-CV-3814, 2009 WL 2707549 (E.D. Pa. August 25, 2009), the district court, by the Honorable Thomas Golden, District Judge, decided that the Berrier court's prediction that Pennsylvania would adopt sections 1 and 2 of the Restatement (3d) of Torts was applicable. The District Court held that the Pennsylvania Supreme Court's procedural dismissal of Bugosh v. I.U. North America, Inc., 971 A.2d 1228 (Pa. 2009), was not a decision on the merits and could not be interpreted as an endorsement or rejection of the Third Circuit's prediction in Berrier. While a subsequent decision by Federal Magistrate Judge Jacob Hart in Durkot v. Tesco Equipment, No. 08-4538, 2009 WL 2902315 (E.D. Pa. September 9, 2009), found that the procedural dismissal in Bugosh represented an outright rejection of Berrier, Magistrate Hart's analysis is suspect. By assigning substantive weight to the single-sentence Order of the Supreme Court, e.g., "appeal dismissed as having been improvidently granted," the Durkot court chose to ignore the Pennsylvania Supreme Court's own pronouncement of the non-substantive impact of the procedural dismissal which occurred in Bugosh:

> [A] dismissal as being *improvidently granted* has the exact same effect as if this Court had denied the petition for allowance of appeal (allocatur) in the first place. Where we dismiss an appeal as *improvidently granted*, the lower tribunal's opinion and order stand as a decision of that court and this Court's order has *no* precedential value.

Commonwealth v. Tilghman, 673 A.2d 898, 904 (Pa. 1996) (emphasis original). Magistrate Hart's decision to ignore as mere "dicta" the Pennsylvania Supreme Court's explanation of the non-significance of an appeal dismissed as improvidently granted, and his unprecedented determination that such a procedural dismissal should somehow be treated as an affirmative rejection of the Berrier court's analysis, is unsupported by any case or authority.

In any event, the fact of a conflict between Judge Golden and Magistrate Hart about how to interpret the Pennsylvania Supreme Court's procedural dismissal of the Bugosh case is irrelevant to the Petition for Writ of Certiorari. The Third Circuit will review these decisions if they are appealed, and if necessary revisit the vitality of its prediction about Pennsylvania state law. As in every other instance of a prediction by a federal circuit court of the likely direction of a particular state's law, the issue will be sorted out by the normal appellate processes. There simply is no significant issue here requiring the Supreme Court's intervention.

CONCLUSION

For the reasons set forth herein, the Berrier Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

/s/ _____

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October 6, 2009

(2)

No. 09-201

Supreme Court, U.S.
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In The
Supreme Court of the United States

SIMPLICITY MANUFACTURING, INC.,
Petitioner,

v.

WAYNE BERRIER AND BRENDA GREGG,
IN THEIR OWN RIGHT AND AS
PARENTS AND NATURAL GUARDIANS OF
ASHLEY BERRIER, A MINOR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court overturn the court of appeals' adoption of the Restatement Third, Torts: Products Liability ("Third Restatement") as a violation of the fundamental constitutional principle of federalism embodied in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in light of the facts that (a) two justices of the state supreme court had, in response to the court of appeals' certification request (denied by the state court), urged the court of appeals to apply current Pennsylvania law narrowly until the state supreme court ruled otherwise, and (b) shortly after the court of appeals' decision, the state supreme court expressly declined an invitation to abandon its long-standing adoption of the Restatement (Second) of Torts § 402A and instead adopt the Third Restatement relied on by the court of appeals?

2. When a state supreme court declines to accept certification of a question of state law, should standards be set that govern the court of appeals' assessment of the state court's action and a concurring statement by two justices of the state court?

LIST OF PARTIES TO THE PROCEEDING BELOW

The names of all parties in the court of appeals are: Simplicity Manufacturing, Inc. (Defendant-Petitioner), and Wayne Berrier and Brenda Gregg, in their own right and as parents and natural guardians of Ashley Berrier, a minor (Plaintiffs-Respondents).

CORPORATE DISCLOSURE STATEMENT

As of January 1, 2008, all of the assets of Simplicity Manufacturing, Inc. have been incorporated into Briggs & Stratton Power Products Group, LLC. Briggs & Stratton Power Products Group, LLC is a wholly owned subsidiary of Briggs & Stratton Corporation, which is a publicly traded company.

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SUPPLEMENTAL BRIEF OF SIMPLICITY MANUFACTURING, INC. IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner Simplicity Manufacturing, Inc. ("Simplicity"), by and through its counsel, submits this supplemental brief in support of its Petition for Writ of Certiorari. Specifically, this brief discusses two very recent and contradictory strict liability cases that have emerged from the United States District Court for the Eastern District of Pennsylvania. *See Durkot v. Tesco Equip.*, No. 08-4538, 2009 U.S. Dist. LEXIS 82387 (E.D. Pa. Sept. 9, 2009) (Hart, J.); *Richetta v. Stanley Fastening Systems*, No. 07-CV-3814, 2009 U.S. Dist. LEXIS 75230 (E.D. Pa. Aug. 21, 2009) (Golden, J.). These opinions illustrate how the court of appeals' decision in the underlying action has thrust Pennsylvania law into a state of confusion and why this Court's intervention is needed to place responsibility for the evolution of Pennsylvania law back into the hands of the Commonwealth's legislature and judiciary.

ARGUMENT

In the weeks after Simplicity filed its Petition for Writ of Certiorari, two contradictory strict liability cases have emerged from the United States District Court for the Eastern District of Pennsylvania that further highlight the already glaring problems with the court of appeals' decision to change Pennsylvania law and adopt the

Restatement (Third) of Torts ("Third Restatement").[1] In one case, the district court followed the court of appeals decision and applied the Third Restatement to a strict liability claim, while in the other, the district court declined to follow the court of appeals decision and applied § 402A of the Restatement (Second) of Torts ("Second Restatement"), consistent with long-standing precedent authored by the Supreme Court of Pennsylvania.

In the first case, *Richetta v. Stanley Fastening Systems*, one of the plaintiffs sustained a personal injury when a nail gun fell off of a ladder and discharged a nail into his body. Plaintiffs alleged that the nail gun was defectively designed because it "did not have a safety switch or trigger lock and that this defect caused [plaintiffs] injuries." *Richetta*, 2009 U.S. Dist. LEXIS 75230, at *1.

In resolving the case, the district court had to decide, as a preliminary matter, whether the strict liability claim was governed by the Third Restatement or the Second Restatement. *Id.* at 5. The court acknowledged that "the differences between the Third Restatement and the Second Restatement are significant, as the Third Restatement emphasizes foreseeable risks of harm while the Second Restatement stresses. . . whether the product was being used as intended by an intended user." *Id.* *7-*8. Indeed, the district court noted that this difference was particularly significant in the case before it because the central debate between the parties was "whether the

[1] See cases previously provided to the Court under cover of Notice of Supplemental Authority, dated September 25, 2009.

[plaintiff] used the nail gun *as intended* at the time of the accident." *Id.* at *8.

The court ultimately concluded that "Berrier applie[d] and, as a result, the Court [had to] apply Sections 1 and 2 of the Restatement (Third) of Torts to Plaintiffs' strict liability claim under Pennsylvania law." *Id.* at *6. The court acknowledged the Pennsylvania Supreme Court's decision in *Bugosh*, but stated that, "[t]he Pennsylvania Supreme Court's recent refusal to address this issue in [Bugosh], [did] not change the Court's conclusion that the Third Restatement applies to the case at bar." *Id.* at 14. Because *Bugosh* was dismissed as "improvidently granted," the court ruled, it could not infer that the Third Circuit's prediction in *Berrier* was invalid. *Id.* at 15.

Less than three weeks later, the same district court held the exact opposite in *Durkot v. Tesco Equip.* 2009 U.S. Dist. LEXIS 82387, at *17. In *Durkot*, plaintiff sued the manufacturer of a catering lift truck, claiming its defective design caused her personal injuries. The defendant urged the court to apply the Third Restatement to the strict liability claim, in light of *Berrier*. The court, however, declined, emphasizing that a "federal court may not impose its view of what the state law should be, but must apply existing state law as interpreted by the state's highest court. . . ." *Id.* at *7. Indeed, it noted that "[w]here a federal court of appeals in a given case has ascertained what it apprehends to be the pertinent state law, such ascertainment of the local law is binding. . .unless it is clearly made to appear... by binding state court decisions that the

law of the state was other than what the federal appellate court understood it to be." *Id.* at *7-8. Thus, the court stated that it was no longer bound by the court of appeals prediction once "later state court decisions indicate that the Court of Appeals' earlier prediction was in error." *Id.* at *9.

In fact, the district court acknowledged that if it did apply the Third Restatement, in light of the Pennsylvania Supreme Court's refusal to adopt it in *Bugosh*, the district court would "be applying a different standard than what would be applied in state court." *Id.* This would have the troublesome effect of "citizens of Pennsylvania receiving disparate treatment of their Pennsylvania product liability actions depending on whether they are in state or federal court." *Id.*

Significantly, and contrary to the court in *Richetta*, the court in *Durkot* found that *Bugosh* invalidated the court of appeals' prediction in *Berrier*. The court reasoned:

> [W]e find that the Third Circuit's prediction as to the Pennsylvania Supreme Court's adopting the Restatement Third simply did not hold true. When presented with the opportunity to adopt the Restatement (Third), even after granting the appeal on the precise issue and hearing extensive oral argument, the [Pennsylvania Supreme] Court did not take the opportunity to do so. We acknowledge that the Court also did not

> specifically reaffirm the existing law. However, by failing to take action, contrary to the Third Circuit's prediction, Section 402(a) remains the law in Pennsylvania.

Id. at *11 (emphasis added). Accordingly, the court held that § 402A of the Second Restatement applied to plaintiff's strict liability claim.

Richetta and *Durkot* are perfect examples of the confusion and inconsistencies that lay ahead in the Commonwealth of Pennsylvania if the court of appeals' decision in *Berrier* is permitted to stand. Moreover, these decisions illustrate the adverse consequences that can result from a federal court's improper decision to change state law. Simply put, these two decisions are clear and convincing evidence of why it is necessary for this Court to vacate the court of appeals' decision in *Berrier* under the long-established principles of federalism embodied in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

CONCLUSION

For the reason set forth herein, the petition for certiorari should be granted.

Respectfully submitted,

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